No. 100422-2

SUPREME COURT
OF THE STATE OF WASHINGTON

SERPANOK CONSTRUCTION INC., a Washington corporation,

Respondent,

v.

POINT RUSTON, LLC; POINT RUSTON PHASE II, LLC; CENTURY CONDOMINIUMS, LLC; and Loren Cohen, personal representative of the Estate of MICHAEL COHEN,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

In an unpublished decision, the Court of Appeals confirmed an arbitration award that rejected petitioner Michael Cohen's[1] attempt to void his obligations under 20 Contract Documents—two construction subcontracts, 16 change orders, and two promissory notes to respondent Serpanok Construction, Inc. Following a three-week evidentiary hearing, the Arbitrator in a 46-page, single-spaced Award (Appendix A, CP 2733-78) carefully considered and rejected Cohen's claim that these 20 performed Contracts Documents were void for illegality or against public policy, and found that Serpanok's actions to aid a Cohen employee's breach of fiduciary duty were collateral to and severable from Cohen's 20 contractual obligations to Serpanok. (CP 2764-66)

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[1] Michael Cohen is deceased. His companies, co-petitioners Point Ruston, LLC, Point Ruston Phase II, LLC, and Century Condominiums, LLC, remain under the control of son Loren Cohen. The petitioners are collectively referred to as "Cohen" here.

The Arbitrator additionally found that Serpanok committed no crime; that Cohen ratified the contracts with knowledge of the misconduct; that Serpanok did not cause damages beyond those for aiding Cohen's subordinate employee's breach of fiduciary duty; and that Serpanok timely completed competitively priced, high-quality work that Cohen accepted. (CP 2745-53, 2760-61, 2763-67) The Arbitrator also awarded Cohen $311,894 as a just and equitable remedy for Serpanok's aiding a fiduciary-duty breach owed to Cohen by his employee. (CP 2759)

The Court of Appeals followed settled law. It rejected Cohen's attempt to go beyond the face of the Award to reassess the Arbitrator's extensive factual findings, his application of the law to the facts, and his exercise of equitable discretion. Cohen's petition again ignores the Arbitration Award, citing to the evidence before the Arbitrator to renew arguments the Arbitrator rejected. This Court should deny review because the Court of Appeals

followed established precedent, RAP 13.4(b)(1), (2), and because its unpublished decision furthers the strong public interest to promote the finality of arbitration awards. *Davidson v. Hensen,* 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). RAP 13.4(b)(4).

B. Restatement of Issues Raised by Petitioners.

1. Did the Court of Appeals properly refuse to look beyond the face of an arbitration award that found Cohen's 20 Contract Documents were severable from, and not induced by, any alleged illegal conduct; that Cohen's top management ratified those 20 Contract Documents and accepted the benefits of Serpanok's performance; and found it unjust and inequitable to void those 20 performed Contract Documents?

2. After finding that the 20 Contract Documents were not the product of illegal conduct, did the Arbitrator exceed his authority in entering an award that dismissed Cohen's commercial-bribery tort claim on the grounds that

(i) the claim has never been recognized as a tort, (ii) the Arbitrator found that Cohen failed to prove a violation of criminal law, and the trial court, in an unchallenged ruling, independently refused to find probable cause, and (iii) Cohen failed to prove loss beyond those the Arbitrator awarded for Serpanok's conduct to aid a fiduciary-duty breach?

C. Restatement of the Case.

The Arbitrator resolved the parties' dispute, after hearing 15 days of testimony and argument in which he also considered thousands of pages of exhibits, as manifested in his 46-page Arbitration Award. Cohen's petition largely ignores the Arbitrator's findings, citing instead to the evidence that the Arbitrator considered in making the factual findings and credibility determinations

contained in his Award.[2] The Court of Appeals properly based its decision on the Arbitrator's findings (Op. 4 & n.2), which are verities on review. (Arg. § D.1, *infra*)

1. Serpanok constructed competitively priced, timely completed, and quality work that Cohen accepted in May 2016 under 20 Contract Documents. Cohen ratified those Contract Documents even after learning that Serpanok aided his employee's misconduct.

Cohen is a developer of his mixed-use "Point Ruston." In 2014, Cohen contracted with Serpanok, a Tacoma-based concrete and steel subcontractor, through two of Cohen's companies (Point Ruston Phase II and Century Condominiums) to build the Garage and apartments, condominiums, retail, a cinema, and parking in Building 1A. (CP 2735-36) This dispute centers on those

[2] *See,* e.g., Pet. 3-4, 13, 15-16 citing (i) Cohen's exhibits and rejected narrative presented in Arbitration (CP 1224-2669) and (ii) Cohen's exhibits and rejected narrative (CP 229-744) presented to the trial court when it found no-probable cause that Serpanok committed bribery. (CP 1218-20, 1222-23)

two subcontracts Cohen signed with Serpanok, as well as subsequent change orders and two promissory notes Cohen signed to induce Serpanok to complete the buildings when Cohen was in default to Serpanok for millions of dollars. (CP 2754-55)

Cohen's petition rests entirely on the Arbitrator's finding that Serpanok improperly paid Cohen employee Larry Hutchinson $80,000 to share confidential information in a failed attempt to help Serpanok procure the contracts and to procure favorable change orders. (CP 2758-59) However Cohen ignores virtually all the other findings established in the Arbitrator's 46-page Award (Appendix A), including the Arbitrator's findings that Cohen, individually, and though management personnel superior to Hutchinson, were pleased by the prices Serpanok offered Cohen at the time of contracting for each building (CP 2745), and that Cohen saved millions of

dollars by choosing to subcontract with Serpanok. (CP 2745, 2766)

Cohen's management team investigated subordinate Hutchinson's misconduct and fired Hutchinson in November 2015. Cohen and his "top management chose long after Mr. Hutchinson's departure" (CP 2764) to insist that Serpanok continue to perform all subcontract work, and agreed to change orders for Serpanok's continued performance, all with knowledge of Hutchinson's misconduct. (CP 2745-48, 2764-66) And after firing Hutchinson, Cohen accepted Serpanok's construction work and then ratified the contract documents. (CP 2746, 2764, 2766-67)

Cohen fell behind on payments due under the subcontracts. In response to Serpanok's demand for payment and to induce Serpanok to complete its performance, Cohen, individually, and in consultation with his management team directed one of his companies

(petitioner Point Ruston LLC) to issue two promissory notes to guaranty past-due Serpanok subcontract invoices that "were massively late (over $2 million in arears on each subcontract . . .)." (CP 2747, 2754) Cohen, personally and through his management team, other than Hutchinson, issued these notes to keep Serpanok on the job. (CP 2747, 2753-55)

Serpanok timely completed its competitively priced and quality work on both buildings by May 2016, six months after Cohen terminated Hutchinson. Cohen accepted the finished work, owing Serpanok $3,089,587 on past-due subcontract invoices and promissory notes that secured Cohen's obligations. (CP 2736, 2748-56)

2. After rejecting Cohen's defenses, including the illegality defense raised here, the Arbitrator entered a $5 million award in favor of Serpanok and awarded Cohen over $300,000, finding Serpanok aided Cohen's employee's breach of fiduciary duty.

Serpanok filed this lawsuit to collect amounts owed by Cohen under the 20 Contract Documents. (CP 2-33) Pierce County Superior Court Judge Jack Nevin ("the trial court") ordered the disputes to arbitration under the broad arbitration clauses contained in both subcontracts. (CP 2740) The parties chose Thomas J. Brewer to serve as Arbitrator. (CP 2734-35)

Cohen asserted a series of defenses, all rejected by the Arbitrator, including defective work and delay damages. And then Cohen affirmatively claimed that Serpanok's enforcement of the notes given to procure Serpanok's performance following Cohen's default violated

the Washington State Securities Act.[3] Cohen last claimed that Serpanok's payments to Cohen's employee were illegal kickbacks, and that each of the subcontracts, the subsequent change orders, and the notes, were void due to fraud and illegality. (CP 2736-37, 2744-53, 2755-56, 2760-61)

Before the Arbitrator issued his final Award, Cohen separately sought a superior court order to refer Serpanok and its president for criminal prosecution on charges of commercial bribery, evidence destruction, and perjury. (CP 229-43) The trial court found insufficient facts to

[3] Cohen's alleged defective-work back charges and delay damages "were not established" (CP 2737, 2750-53), as "Serpanok's work was, in [Mr.] Cohen's words, 'as good or better than most and certainly quicker than most.'" (CP 2752, quoting Arb. Ex. 305) The Arbitrator found the Notes "were not intended as investments by the parties but rather were . . . intended to assure complete payment of construction subcontract invoices already due to the Subcontractor." (CP 2755)

establish probable cause to prosecute, and denied Cohen's motion. (CP 1218-20, 1222-23)[4]

Cohen extensively rehashes the evidence and allegations (Pet. 3-4, 13, 15-16) that the Arbitrator characterized as "many aggressive and rhetorical factual assertions" in rejecting Cohen's contention that "the subcontracts, change orders, and Notes were induced by" Serpanok's misconduct in paying Cohen's employee Hutchinson. However, "the actual facts proven at the Arbitration Hearing . . . were to the contrary." (CP 2764)

Although finding that Serpanok "aided and abetted breaches of fiduciary duty by Mr. Hutchinson" (CP 2758-59), the Arbitrator refused to find that the breaches "wrongfully induc[ed] the two subcontracts or . . . caus[ed Cohen] to overpay subsequently for change order work". (CP 2759) The Arbitrator next refused to find that "the

[4] Cohen chose not to challenge this order in his appeal. The trial court's no-probable cause finding is therefore a verity. *Mueller v. Wells,* 185 Wn.2d 1, 9, 367 P.3d 580 (2016).

subcontracts, change orders, or notes at issue here were '"illegal contracts'" (CP2764) and refused:

> to automatically invalidate other, collateral agreements—the two construction subcontracts and the Notes—that ran between [Serpanok] and various of the [Cohen petitioners], to which Mr. Hutchinson was not a party. . . because [Serpanok] was found, by a preponderance of the evidence, to have aided and abetted breaches of fiduciary duty by one of the agents of [Serpanok's] counterparties. . .

(CP 2765)

The Arbitrator last found as a matter of fact that Cohen "failed to establish an adequate causal link between the misconduct found on the aiding and abetting counterclaim and the relief sought [to void the 20 Contract Documents]." (CP 2766)

The Arbitrator instead found that Serpanok's improper payments to Hutchinson were separate and independent of the 20 subcontracts, change orders, and notes at issue. (CP 2759, 2764-66) The subcontracts were approved by a senior Point Ruston manager who had

nothing to do with the improper payments to Hutchinson, in no small part because Serpanok's bids were millions of dollars lower than the next closest bids for both buildings. (CP 2745, 2766) Cohen ratified these subcontracts by "aggressively and repeatedly" insisting on Serpanok's continued subcontract performance, by executing change orders and the notes following discovery of Hutchinson's payments and his departure from Cohen's employment. (CP 2745-48, 2766)

In sum, Serpanok's improper payments did not cause Cohen any damages with respect to the subcontracts, change-orders, or notes enforced in Arbitration nor did those payments induce those 20 Contract Documents. (CP 2745-47, 2750, 2752-55, 2759, 2763-67)

> [T]he collateral contracts that [Cohen] seeks to invalidate were entered into by organizational parties with numerous top management officials in addition to Mr. Hutchinson, . . . Hutchinson's role in performance of the challenged collateral contracts was confined to only a portion of the relevant time period, . . . other top executives of [Cohen] reviewed the

> situation after Mr. Hutchinson left and approved change orders that had the effect of requiring [Serpanok] to complete performance as agreed under the subcontracts and change orders, and where [Cohen] received the benefits of millions of dollars of valuable work done by Claimant at their insistence. . . . [Cohen] failed to establish an adequate causal link between the misconduct . . . and [voiding 20 Contract Documents].
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> * * *
>
> [T]hat [Serpanok] engaged in the misconduct found on the aiding and abetting counterclaim should not become a pretext allowing [Cohen] to escape their duty to pay for millions of dollars worth of valuable work done on their buildings in accordance with the parties' contracts.

(CP 2765-66)

Moreover, the Arbitrator did not deny Cohen all relief. While finding that "it would not be 'just and equitable' to grant [Cohen's] requests for disgorgement or other sweeping restitutionary relief on account of Serpanok's aiding and abetting misconduct" (CP 2759), the Arbitrator awarded Cohen $311,894 on his claim that

Serpanok aided and abetted a breach of fiduciary duty owed by Hutchinson to Cohen.[5] (CP2759)

The Arbitrator awarded Serpanok $4,646,062 in damages, $1,302,951.29 for fees and expenses, and $180,330 for Arbitration expenses ($6,129,313.29). (CP 2775-77)

3. The Court of Appeals affirmed the trial court's confirmation of the Arbitration Award, refusing to go beyond the face of the Award to reject the Arbitrator's finding that the 20 Contract Documents were collateral to any illegal transaction.

The trial court confirmed the Award, offsetting Cohen's damages, entering judgment in favor of Serpanok for $5,066,602.44, plus interest and fees. (CP 2728, 2890) The Court of Appeals affirmed the trial court's judgments,

[5] The Arbitrator also found that Serpanok had recorded a stale Building 1A mechanics' lien ($481,170 in damages), and ordered Serpanok to pay discovery sanctions of $500,000. (CP 2776-77)

its confirmation of the Award, and its denial of Cohen's motion to vacate the award. (Op. 22-33)

In its unpublished decision, Division Two refused to "reevaluate the evidence and make a different determination as to whether the kickback scheme was collateral or severable from the subcontracts, change orders and notes." (Op. 27) The Court of Appeals held that a reviewing court lacked authority to second guess the arbitrator's finding the "subcontracts were collateral to the illegal kickback scheme" (Op. 26) or review the Arbitrator's exercise of discretion in fashioning an equitable remedy to restore to Cohen "not only the amount of the kickbacks but also the amount that Hutchinson was compensated while he was breaching his fiduciary duty and attempting to benefit Serpanok." (Op. 28-29)

D. Argument Why Review Should Be Denied.

1. The Court of Appeals applied established precedent, refusing to go beyond the face of the Award to reassess the Arbitrator's findings that rejected Cohen's illegality defense after finding that the 20 Contract Documents were collateral to any alleged illegal kickback.

The appellate court is "bound by the arbitrator's findings of fact," which are verities for purposes of appeal. *Int'l Union of Operating Engineers, Local 286 v. Port of Seattle,* 176 Wn.2d 712, 716, 724, 295 P.3d 736 (2013). Because arbitrators "become the judges of both the law and the facts," courts do not "look to the merits of the case, and they do not reexamine evidence." *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 904, 359 P.3d 884 (2015) (internal quotation and citation omitted), *rev. denied*, 185 Wn.2d 1006 (2016). Cohen pays lip service to a reviewing court's limited authority under RCW 7.04A.230(1)(d) to set aside an award on the ground that "[a]n arbitrator exceeded the arbitrator's powers" (Pet. 19-

20), but ignores that bedrock principle by asking this Court to reweigh the evidence and to reach findings that the Arbitrator expressly rejected.

For instance, the Arbitrator (as well as the trial court) expressly rejected Cohen's current contention that by aiding Hutchinson's fiduciary-duty breach, "Serpanok violated every element of Washington's criminal commercial bribery statute. *See* RCW 9A.68.060(2)(a)." (Pet. 10) To the contrary, the Arbitrator found that Cohen failed to establish a violation of RCW 9A.68.060. (CP 2760-61, 2764) Cohen also ignores the trial court's unchallenged order, finding that Cohen's allegations lacked a threshold basis to establish probable cause for criminal bribery. (CP 1218-20, 1222-23)

In asserting that the Arbitrator's decision undermines public policy by enforcing an "illegal agreement," Cohen similarly asks this Court to disregard the Arbitrator's findings that Serpanok's misconduct did

not induce and was collateral to the 20 Contract Documents enforced in arbitration. But "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Clark Cty. Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers*, 150 Wn.2d 237, 246, 76 P.3d 248 (2003), quoting *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir.1993). The Court of Appeals properly held it was bound by the Arbitrator's assessment of the facts, adhering to established precedent to reject Cohen's contention that the Award exceeded the Arbitrator's authority under RCW 7.04A.230(1)(d).

The Court of Appeals decision does not conflict with any of the decisions cited by Cohen. For instance in *Int'l Union of Operating Engineers* (Pet. 21), this Court *reinstated* an arbitrator's decision that had reversed the termination of a port employee for conduct far more outrageous and abhorrent to public policy than that

involved here—a worker had placed a hangman's noose on the shop floor where it was plainly visible to a Black co-worker in clear violation of the Port's antiharassment policy, holding "[w]e are bound by the arbitrator's findings of fact." 176 Wn.2d at 724.

Cohen also cites the "narrow exception" that allows a reviewing court to refuse to enforce an arbitration decision that violates public policy, recognized in *Kitsap Cty. Deputy Sheriff's Guild v. Kitsap Cty.*, 167 Wn.2d 428, 436, 219 P.3d 675 (2009) (Pet. 9). However, Cohen ignores that the *Kitsap* Court *reversed* a Court of Appeals decision vacating an arbitrator's award that reinstated an officer the county had fired for dishonesty. The Court held that a reviewing court lacked authority to vacate the arbitrator's award, which found that the officer engaged in dishonest, illegal conduct; there was no public policy requiring that an arbitration award terminate that officer's employment even for his illegal conduct. 167 Wn.2d at 437-39. Unlike in

Kitsap, the Arbitrator found that Serpanok did not engage in illegal conduct, but "deplorable conduct," that justified a compensatory award to Cohen of $311,894, as a "reasonable estimate . . . to quantify the precise amount of [Cohen's] damages." (CP 2747, 2759)

The only cases cited by Cohen that vacate an arbitrator's award as contrary to law and policy (Pet. 8-9) do so because the arbitrator granted relief unavailable under Washington law. *See Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983) (arbitrator's award of punitive damages was, on its face, contrary to Washington law and public policy); *Federated Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 125, 4 P.3d 844 (2000) (vacating arbitration award of loss of potential inheritance in survival action), *rev. denied*, 142 Wn.2d 1025 (2001). This Award, however, does not grant any relief barred by Washington law. Cohen instead challenges the Arbitrator's

application of the law of illegality to the facts of this particular case by challenging the Arbitrator's findings that Cohen failed to prove illegality.

Whatever traction Cohen's arguments might have in appellate review of a trial court's decision, that searching review is barred under the Washington Arbitration Act, as Division Three recently held, summarizing this Court's precedent:

> Courts do not look to the merits of the case, and they do not reexamine evidence. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d at 239, 236 P.3d 182. An arbitration award shall not be vacated if the appellant's argument cannot be decided without delving into the substantive merits of the claim. *Davidson v. Hensen*, 135 Wn.2d at 121, 954 P.2d 1327 (1998). . . . We do not reach the merits of the arbitrator's legal conclusions. *Clark County Public Utility District No. 1 v. International Brotherhood of Electrical Workers*, 150 Wn.2d 237, 239, 76 P.3d 248 (2003). We do not even review the arbitration decision under an arbitrary and capricious standard. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 318, 237 P.3d 316 (2010).

Mainline Rock & Ballast, Inc. v. Barnes, Inc., 8 Wn. App.2d 594, 439 P.3d 662, *rev. denied*, 193 Wn.2d 1033 (2019).

The Court of Appeals decision is consistent with this Court's cases and those from the Court of Appeals. RAP 13.4(b)(1), (2). The Court should deny review.

2. The Court of Appeals properly refused to vacate the Arbitrator's Award, which correctly enunciated and applied Washington contract law of illegality.

As the Court of Appeals held, Washington courts "generally do not enforce illegal . . . contracts that grow out of illegal acts," unless the contract is severable, that is "'remote from or *collateral* to the illegal transaction, or is supported by independent consideration.'" (Op. 25, emphasis added, quoting *Golberg v. Sanglier*, 96 Wn.2d 874, 879, 639 P.2d 1347, 647 P.2d 138 (1983) and *Sherwood & Roberts-Yakima, Inc. v Cohan*, 2 Wn. App. 703, 710, 469 P.2d 574, *rev. denied*, 78 Wn.2d 994 (1970)). The Court of Appeals held that the Arbitrator "effectively

addressed severability" (Op. 26) by recognizing that an illegal agreement between Serpanok and Hutchinson does not "automatically invalidate other, collateral agreements." (CP 2765, discussing *State v. Pelkey*, 58 Wn. App. 610, 794 P.2d 1286 (1990)).

Cohen does not dispute this principle. And none of the cases cited by Cohen require a court to invalidate agreements that are collateral to one that is itself illegal or violates public policy. In *Amtruck Factors, a Div. of Truck Sales, Inc. v. International Forest Products*, 59 Wn. App. 8, 795 P.2d 742 (1990), *rev. denied*, 116 Wn.2d 1003 (1991), Division One relied on *Sherwood & Roberts* when it remanded for a factual determination whether a shipping company's agreements to haul lumber "were severable from the kickback scheme" of its employee. *Amtruck Factors,* 59 Wn. App. at 21 & n.3. In *Pelkey*, which the Arbitrator distinguished, the Court of Appeals refused to enforce an agreement that would require the court to order

return of property given to a police officer as a bribe; the decision addressed the enforceability of "the agreement between Pelkey and Sgt. Brauch . . . ," not separate agreements, as here. 58 Wn. App. at 615.

The Court of Appeals properly rejected as semantics Cohen's contention that the Arbitrator's use of the terms "induce" or "collateral" rather than "severable," or what Cohen labels "the correct 'grows out of' or 'connected with' or 'tainted' standard" (Pet. 20), resulted in an award that "exceeded the arbitrator's powers" within the meaning of RCW 7.04A.230(1)(d).[6] The Arbitrator nonetheless accurately summarized the contract principle of illegality, citing and distinguishing *Pelkey* in finding that the contracts here were collateral to, or not induced by, any

[6] At the Arbitration hearing, Cohen primarily relied on a claim of fraud to void the Contract Documents. If the Arbitrator failed to delve more deeply into the severability doctrine, it is only because Cohen waited until reconsideration to emphasize his illegality argument. (CP 2765)

disproven illegal agreement to pay Hutchinson. (CP 2764-66)

Cohen's argument that the Arbitrator "did not use the correct test" of illegality requires the court to ignore the Award or improperly review it on a de novo basis. The Arbitrator carefully evaluated the evidence in finding that the 20 Contract Documents were not only ratified after discovery of the misconduct (CP 2746),[7] but that they were "collateral to" the illegal conduct engaged in by Hutchinson and Serpanok:

> [Cohen] seeks to automatically invalidate other, collateral agreements—the two construction subcontracts and the Notes—that ran between [Serpanok] and [Cohen], to which Mr. Hutchinson was not a party.
>
> . . .

[7] Cohen's ratification of the the Contract Documents, standing alone, defeats his illegality claim, *see Kessler v. Jefferson Storage Corp.,* 125 F.2d 108, 109-12 (6th Cir. 1941), and distinguishes this case from *Sinnar v. Le Roy*, 44 Wn.2d 728, 729, 270 P.2d 800 (1954) *or Pelkey*, 58 Wn. App. at 615, where the contract, itself, was illegal.

> [T]he collateral contracts that the motion seeks to invalidate were entered into by organizational parties with numerous top management officials in addition to Mr. Hutchinson, where Hutchinson's role in performance of the challenged collateral contracts was confined to only a portion of the relevant time period, where other top executives of [Cohen] reviewed the situation after Mr. Hutchinson left and approved change orders that had the effect of requiring [Serpanok] to complete performance as agreed under the subcontracts and change orders, and where [Cohen] received the benefits of millions of dollars of valuable work done by [Serpanok] at their insistence. [Cohen] failed to establish an adequate causal link between the misconduct found on the aiding and abetting counterclaim and the relief sought in the motion.

(CP 2765-66)

When not ignoring the Arbitrator's findings, Cohen misrepresents them. For instance, the Arbitrator never found that Cohen's two subcontracts, 16 change orders, and two promissory notes to Serpanok were "inextricably intertwined" with Hutchinson's breach of fiduciary duty. (Pet. 5) Instead, he found that each of the "issues" arising

under the contracts were "intertwined" in making a threshold determination of arbitrability:

> [A]ll of the counterclaims, whether based on the subcontracts, the Notes, the issues raised by the liens that were filed, and to the common law fraud and other tort-based and statute-based counterclaims, all of which "concern" the subcontracts and all of which raise issues that are inextricably intertwined with issues already determined to be arbitrable by the Court Order.

(CP 2741)

The Court of Appeals properly refused to look beyond the face of the Award to reject Cohen's contention that the Award itself renders an improper payment to Hutchinson "inextricably intertwined" with the contracts at issue in Arbitration. The Arbitrator found as a purely factual matter that those 20 Contract Documents were collateral to, and not induced by, the agreement between Serpanok and Hutchinson, and rejected Cohen's claim that these Contract Documents were void for illegality. The Court of Appeals decision refusing to vacate the Arbitrator's Award presents no grounds for review. RAP 13.4(b)(1), (2).

3. The Arbitrator did not exceed his authority to reject, on the law and the facts, Cohen's assertion of a public-policy tort based on RCW 9A.68.060(2)(a) that no Washington legislature or court has recognized.

The Court of Appeals properly held that "the arbitrator's decision not to grant relief under a novel theory of liability does not create a legal error on the face of the award." (Op. 32) The Arbitrator's refusal to recognize a novel "public policy tort claim" or "private right of action under RCW 9A.68.060" (Pet. 28) was justified both by the law and, independently, by his factual findings that are verities for purposes of appeal.

Unlike the well-established "tort for wrongful discharge against public policy" at issue in *Becker v. Cmty. Health Sys., Inc.,* 184 Wn.2d 252, 255, 359 P.3d 746 (2015) (Pet. 28), neither this Court nor legislature has established a private right of action based on the criminal-bribery statute. Cohen fails to explain how an Arbitrator's refusal to adopt a non-existent cause of action constitutes legal

error on the face of the Award. *Compare Federated Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. at 125 (arbitrators recognized that their award of loss of potential inheritance in survival action lacked precedent and then invited judicial review).

Moreover, Cohen's novel "public policy tort" could not further the policies of advancing honesty and fair dealing in the construction industry, championed by Cohen, under the facts found by the Arbitrator here. The Arbitrator found that Cohen failed to establish that: (i) Serpanok acted with the requisite criminal intent (CP 2760-61, 2764), (ii) Serpanok's misconduct induced 20 Contract Documents based on a preponderance of evidence, or that (iii) those Contract Documents constituted "illegal contracts." (CP 2759, 2764-66) The trial court separately found no probable cause that Serpanok violated the criminal-bribery statute, rejecting Cohen's

motion for an order referring an alleged crime to the Pierce County Prosecutor. (CP 1218-20, 1222-23)

The Court of Appeals' holding that "the arbitrator did not commit facial legal error or exceed his authority" (Op. 32) in rejecting this novel claim based on unreviewable factual findings presents no issue of substantial public concern. RAP 13.4(b)(4).

4. The Court of Appeals properly held that the Arbitrator had authority to issue equitable relief and to assess damages for Serpanok's aiding a fiduciary-duty breach.

Contrary to Cohen's assertion, the Court of Appeals did not hold "the Arbitrator had the discretion to award contract damages despite the finding of an illegal scheme." (Pet. 23) To the contrary, the Court of Appeals held that the Arbitrator rejected the illegality defense on factual grounds and then properly crafted an equitable remedy. (Op. 29) That decision presents no ground for review.

Independent of the severability doctrine, the Arbitrator also found that it would be unjust and inequitable to allow Cohen to benefit from Serpanok's work, to complete two buildings, without compensation, particularly after Cohen's discovery of the misconduct, where Cohen "aggressively and repeatedly demanded that Serpanok continue working on the Project to get it completed" and with promissory-note guarantees that Cohen issued because his payment obligations on the subcontracts "were massively late (over $2 million in arrears on each subcontract . . ."). (CP 2747-48, 2754, 2764, 2766-67) The Arbitrator properly exercised his discretion to craft a remedy pursuant to Rule 47(a) of the AAA Commercial Rules, under which "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." (CP 2759, 2766-67) The Arbitrator awarded Cohen $311,984, representing not just the amounts paid by

Serpanok to Hutchinson, but also the amounts Cohen had paid Hutchinson. The Court of Appeals' refusal to hold that this Award for Serpanok's involvement in Hutchinson's breach of fiduciary duty to Cohen violated public policy presents no issue for this Court's review.

E. This Court should award Serpanok fees under RAP 18.1(j).

The Court of Appeals awarded Serpanok fees under the parties' subcontracts, promissory notes, and the lien statute, RCW 60.04.181(3), in responding to Cohen's appeal. (Op. 37-38) Upon denial of review, this Court should award Serpanok fees for answering Cohen's petition. RAP 18.1(j).

I certify that this answer is in 14-point Georgia font and contains 4,897 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 28th day of January, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 28, 2022, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail _x_ E-File
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Jack Krona Law Offices of Jack B. Krona 6509 46th St NW Gig Harbor, WA 98335 j_krona@yahoo.com	____ Facsimile ____ Messenger ____ U.S. Mail _x_ E-Mail

DATED at Seattle, Washington this 28th day of January, 2022.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:	)
	)
SERPANOK CONSTRUCTION, INC.	)
	)
Claimant and Respondent by Counterclaim,	)
	)
and	)
	)
POINT RUSTON, LLC; POINT RUSTON PHASE II, LLC; CENTURY CONDOMINIUMS, LLC; and MICHAEL COHEN	)
	)
Respondents and Counterclaimants.	)
	)
AAA Case No. 01-17-0002-5388	)
	)

FINAL AWARD

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Arbitrator:

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Administrator:

Michael Powell
American Arbitration Association
725 S. Figueroa Street
Suite 400
Los Angeles, CA 90017

Place of Arbitration: Tacoma, Washington (Hearings March 18-22, 25-29, and April 1-5, 2019)

Date of Interim Award: June 19, 2019

Date of Final Award: October 18, 2019

THE UNDERSIGNED ARBITRATOR has been duly sworn and designated by the parties, Serpanok Construction, Inc., Point Ruston, LLC, Point Ruston Phase II, LLC, Century Condominiums, LLC, and Michael Cohen in accordance with the arbitration provisions of the two subcontracts executed on April 1 and 7, 2014 and December 19 and 23, 2014, respectively,

and as further directed by a prior Order, dated March 23, 2017, of the Superior Court of the State of Washington in and for Pierce County, in that Court's Cause No. 16-2-13153-6, and pursuant to the Commercial Arbitration Rules ("Rules") of the American Arbitration Association ("AAA").

This Arbitration Tribunal, having fully heard, examined and considered all of the submissions, proofs and allegations of the parties, and having previously issued an Interim Award in this matter dated June 19, 2019, finds, concludes and issues this Final Award as follows:

I. Introduction and Procedural Statement.

Parties. Claimant and respondent by counterclaim Serpanok Construction Inc. ("Serpanok") is a concrete and steel construction contractor based in Tacoma, Washington, and owned by Mr. Igor Kunitsa.

Respondents and Counterclaimants Point Ruston, LLC ("PR"), Point Ruston Phase II, LLC ("PR Phase II") and Century Condominiums, LLC ("Century") are separate but affiliated legal entities devoted to the development of a real estate project in Tacoma and Ruston, Washington, commonly known as the "Point Ruston Project." Respondent and counterclaimant Michael Cohen was the Manager of the Point Ruston Project at all relevant times. This award refers to the Respondents collectively as "Respondents" or "Point Ruston."

Pleadings. Serpanok initially filed its Demand with the AAA in this arbitration on May 2, 2017. With my permission, the parties subsequently filed various amended pleadings explaining and amplifying their claims and counterclaims. Claimant Serpanok's finalized statement of its claims is set forth in "Claimant Serpanok Construction Inc.'s Amended Statement of Claims and Damages," dated October 2, 2017 ("ASOC"). Respondents' Answer was submitted on May 22, 2017 ("Answer"). Respondents chose not to file an additional answer to the ASOC, which decision operated to deny the claims made in the ASOC. (Rules, Section R-5(a)). Counterclaimants' finalized counterclaims are set forth in "Respondents' Second Amended Counterclaim Statement," filed January 30, 2019 ("Amended Counterclaims"). Claimant's answer to the earlier counterclaims, and jurisdictional objection to certain of the counterclaims, was submitted on June 22, 2017. Claimant chose not to file an additional answer to the Amended Counterclaims, which decision operated to deny the claims made in the Amended Counterclaims. At my direction (Procedural Order No. 17, ¶10), the parties filed updated quantifications of their claims and counterclaims on February 18, 2019, shortly before the Arbitration Hearing. The parties were also directed (Procedural Order No. 25, ¶4) to include appendices with their post-hearing briefs stating the precise relief sought on their respective claims and counterclaims in light of the evidence presented at the Arbitration Hearing, and timely did so.

Brief Summary of the Claims and Counterclaims. The Point Ruston Project ("Project") is a complex commercial real estate development project that includes condominiums,

apartments, retail shops and businesses, restaurants, parking facilities, a cinema and various other features. The Project was built on the site of the former Asarco Copper Smelter, a federal EPA "Superfund" site, and surrounding neighborhood. It involved both sequential and simultaneous construction of multiple buildings and structures over a number of years. The Project faced many complexities, including regulatory, financial, scheduling and construction issues, during the time period relevant to this arbitration.

In brief, Claimant alleges that it entered into separate subcontracts in 2014 with Respondent PR Phase II to perform extensive work on two of the Project's buildings, Building 1A (which included the Cinema, an "anchor" feature of the Project) and Building 9/11 (the Parking Garage for the Project). Shortly after Serpanok started work on the Building 1A subcontract, Respondents carried out an intra-company transfer of title of that building to Respondent Century, which thereafter became the real party in interest under the Building 1A subcontract. Claimant alleges that it substantially completed its work on Building 1A in November 2015, including extra work beyond the subcontract's original scope that was approved in various change orders, but is still owed $852,740 in principal amount, plus interest, for work done on Building 1A. Claimant also alleges that it is still owed $2,236,847 in principal amount, plus interest, for work done on the Garage (Building 9/11) for which it has not yet been paid. Claimant also alleges that it was wrongfully prevented from completing about $100,000 of its remaining scope of work on the Garage by Respondents' failure to approve a change order for necessary and agreed extra work at the Grid Line 1 portion of the Project. In addition, Claimant seeks an award foreclosing mechanic's liens it filed on the two buildings in amounts roughly similar to those sought on the subcontract claims. Claimant further alleges that, after it had done substantial work on the two buildings and Respondents had fallen behind on their payment obligations for that work, Respondent PR issued two notes ("Note 2" and "Note 3") to Serpanok in order to induce Serpanok to keep working despite the late payments. Claimant alleges breaches of the terms of those notes, and seeks an award for allegedly unpaid principal amounts. Finally, Claimant alleges that when work stopped on the Garage in the Spring of 2017 some of its construction equipment was tortiously converted by Respondents Michael Cohen and PR Phase II. Claimant seeks an award of damages for this alleged conversion.

As summarized in its Post-Hearing Brief, Claimant seeks a total award of $4,446,976 (including interest accrued as of the date of that submission) against Respondents PR Phase II and Century on its claims based on the subcontracts, a total award of $4,181,992 on its mechanics lien claims, awards against Respondent PR for $857,654 on Note 2 and $1,224,977 on Note 3 (including interest), an award of $255,866.56 against Respondents Michael Cohen and PR Phase II on the conversion claim, and an award of its attorneys' fees and litigation costs. Claimant concedes that, its claims for conversion damages and for fees and costs aside, its total recovery on all of its other claims may not exceed $4,446,976.

Respondents deny and seek dismissal with prejudice of all of Claimant's claims. Counterclaimants allege that they were the victims of a fraud perpetrated by Claimant and Mr. Larry Hutchinson, Respondents' former Construction Manager for the Point Ruston Project. Mr. Hutchinson is not a party to the present arbitration. In brief, Counterclaimants allege that

Serpanok made secret and improper payments to Mr. Hutchinson in return for his assistance in approving false invoices, favorable contract terms and unwarranted change orders to the detriment of Point Ruston, and that Serpanok fraudulently failed to disclose these payments, the unwarranted concessions it allegedly obtained in return for the payments and other material facts, and made material misstatements to Counterclaimants concerning its alleged arrangement with Mr. Hutchinson. Counterclaimants allege that they reasonably relied on the fraud and suffered damages as a result. Counterclaimants also allege that Serpanok aided and abetted Mr. Hutchinson's breaches of fiduciary duties owed to Respondents, tortiously interfered with Respondents' business expectancy with their Construction Manager, violated Washington's commercial anti-bribery statute and Washington public policy, and violated the Washington State Securities Act ("WSSA") by entering into the Notes without prior disclosure of the alleged fraud. Alternatively, Counterclaimants contend that Serpanok, not Respondents, breached the two construction subcontracts in various respects, and violated Serpanok's covenant of good faith and fair dealing, for which Counterclaimants seek damages.

Counterclaimants seek an award in their favor requiring Serpanok to disgorge all of the profits it earned on the two subcontracts, pay Counterclaimants an amount equal to all of the kickbacks Serpanok allegedly paid to Hutchinson, pay Respondents an amount equal to all of the compensation Respondents paid to Mr. Hutchinson, and refund all of the payments made under the Notes. Counterclaimants also seek additional damages for costs allegedly caused by the lien Serpanok filed on Building 1A, which Counterclaimants allege was frivolous and excessive in amount. In total, as summarized in their Post-Hearing Brief, Counterclaimants seek an award that allows them to elect recovery of either $6,667,947 on their equitable counterclaims or $3,881,631 on their contract-based claims, plus $1,741,096 on the Notes, $311,894 for the improper payments allegedly made to Mr. Hutchinson and recovery of the salary paid to him, $394,114 on the lien costs claim, and an award of their attorneys' fees and litigation costs.

Claimant denies all of the counterclaims, challenges the arbitrability of certain of them, and seeks an award in its favor denying the others with prejudice.

Procedural Summary. The Arbitration Tribunal was constituted on July 10, 2017, with confirmation by the AAA of my appointment as the arbitrator.

The initial Preliminary Hearing was held on August 18, 2017, with counsel for the parties. At that hearing, the parties confirmed their agreement to applicability of the Rules, the parties agreed and I set the pre-hearing and Arbitration Hearing schedule, and various matters were resolved relating to the conduct of the Arbitration Hearing. (Procedural Order No. 1.) In addition, the parties and I agreed that the following procedure would be used to resolve any claims for attorneys' fees, costs and interest:

> 15. . . . The parties and I agreed that the following procedure will be used to address claims for attorneys' fees, costs and interest: After the Arbitration Hearing is completed the record

> will not be closed. Rather, I will issue an Interim Award resolving all issues in dispute except those relating to claims for attorneys' fees, costs and interest. The Interim Award will set a schedule for additional written submissions from the parties on the reserved fees, costs and interest issues. After these have been received the record will be closed. Unless the parties agree otherwise, the fees, costs and interest issues will be resolved based on these written submissions, without an additional hearing and without oral argument. Following the closing of the record, a Final Award will be issued in due course.

(Procedural Order No. 1, ¶¶ 14 and 15.)

Subsequently, the parties engaged in discovery, raised various issues related to amendments of their pleadings, filed dispositive, discovery-related and other motions, and submitted pre-hearing briefing in order to prepare the case for hearing, with some revisions in the schedule and other procedural matters being ordered from time to time. (*See* Procedural Orders Nos. 2-24. The dispositive motions were denied in Procedural Orders Nos. 17 and 19.)

The Arbitration Hearing. Pursuant to notice, the Arbitration Hearing in this matter was held and completed on March 18-22, 25-29, and April 1-5, 2019, in Tacoma, Washington. At the Arbitration Hearing, the parties called Igor Kunitsa, Victor Mikhalchuk, Rodney Campbell, Jim Corp, Eric Rosenthal, Kell Rabern, James Blissett, Larry Hutchinson, George Drabner, Irina Mikeladze, Steve Yester, Jim Scherbinske, Michael Cohen, Al Malcolm, Rodney McCarten, Yuchun Santory, Richard A. Dethlefs, James Elves, Lawrence Guck, Brian Fyall, P. J. Santos, Douglas McDaniel and Bruce Blake to give sworn testimony under oath. All witnesses were made available for cross-examination and re-direct examinations. The parties also offered agreed deposition designations from the depositions of Casey Stegin, Robert Haley, Guy W. Baryo and from the corporate depositions of Century Condominiums, LLC, Point Ruston Phase II, LLC, and Point Ruston, LLC; all of these deposition designations were admitted into evidence. The parties also offered numerous documentary exhibits. The specific exhibits admitted into evidence at the hearing were itemized on an agreed list jointly prepared by the parties and appended to Procedural Order No. 26.

The parties engaged Terilynn Simons, Certified Court Reporter, CCR, RMR, CRR, CLR, to transcribe the Arbitration Hearing. Her transcript ("Tr.") constitutes the official record of the proceedings at the Arbitration Hearing. *See* Rules, Section R-28.

At the conclusion of the Arbitration Hearing, I specifically inquired of the parties whether, with the exception of post-hearing briefs, and submissions on the reserved issues relating to claims for interest, fees and costs, they had any further proofs to offer or witnesses to be heard. *See* Rules, Section R-39(a). All parties gave negative replies to this inquiry. Based on these responses, I determined that the evidentiary record was complete as to all issues to be addressed in the Interim Award, with the following exceptions: (i) At the conclusion of the

hearing, I set a schedule for the parties to submit post-hearing briefs and present closing oral arguments on the issues to be addressed in the Interim Award. (ii) The parties agreed once again and I directed that the Interim Award would set a schedule for additional submissions on the reserved issues relating to claims for attorneys' fees, costs and interest, employing the procedures discussed above. In addition, the parties agreed and I directed that the due date for issuance of the Interim Award in this matter would be June 21, 2019. Finally, the parties agreed, and I directed, that the hearing record in this matter, as that term is used in the Rules, Section R-39, was not closed, but rather would remain open until the additional submissions invited in the Interim Award on the reserved issues had been received. (Procedural Order No. 25.)

The parties timely filed their post-hearing briefs and reply briefs during April and May 2019. In-person closing oral arguments were heard on the issues to be addressed in the Interim Award on May 22, 2019, in Seattle. Following the closing arguments, those issues were submitted for decision.

Interim Award. An Interim Award was issued on June 19, 2019, resolving all of the substantive issues in dispute, except those issues that the parties agreed would be reserved for the Final Award. The Interim Award is hereby confirmed and incorporated in this Final Award as set forth herein. As agreed by the parties, the Interim Award also set a schedule for additional written submissions from the parties on those reserved issues. Subsequently, the parties' submissions on those issues were timely received after the parties jointly requested and obtained my approval of a revised schedule for those submissions.

Motion for Reconsideration. On July 1, 2019, the Point Ruston Respondents filed a motion for reconsideration of various decisions made in the Interim Award. The parties subsequently entered into and I approved a briefing schedule for that motion. Thereafter, the parties timely filed opposition and reply papers on the motion for reconsideration in accordance with their agreed schedule. The parties also entered into a stipulation that my decision on the motion for reconsideration would be timely issued if included in or issued on or before the date of the Final Award herein. Exercising the discretion granted to me under that stipulation, I have elected to include my decision on the Respondents' motion for reconsideration below, in the present Final Award.

Record Closed. The hearing record was declared closed on September 16, 2019. (*See* Rules, Section R-39.) After the record was closed, the parties stipulated that the Final Award would be timely issued if issued on or before October 18, 2019. (*See* Rules, Section R-39(c).)

II. ARBITRABILITY.

Both of the parties' subcontracts contained identical arbitration clauses. Those clauses each provide, in pertinent part:

> In the event of a dispute concerning this Agreement, its meaning or enforcement, such dispute shall be submitted to a single arbitrator, under the commercial arbitration rules of the American Arbitration Association, with the arbitration to be held in Tacoma, Washington. . ..

(Exs. 10/1072, ¶16.1 (Building 1A Subcontract); Ex. 119/1204, ¶16.1 (Building 9/11 [Garage] Subcontract)).

After the parties' dispute arose, they litigated issues of arbitrability before the Superior Court of the State of Washington in and for Pierce County, The Hon. Jack Nevin, in that Court's Cause No. 16-2-13153-6. After receiving submissions from the parties, the Court issued a letter ruling dated March 17, 2017, holding that the above arbitration clause is valid, that Serpanok's breach of contract, tortious conversion, mechanic's lien foreclosure and action on the Notes against PR Phase II, PR, Century and Michael Cohen were all arbitrable under the above provisions and that the Federal Arbitration Act ("FAA," 9 U.S.C. §1, *et seq.*) applies to this arbitration. The Court issued a formal Order confirming those conclusions on March 23, 2017 ("Court Order"). This arbitration followed.

At the initial Preliminary Hearing held on August 18, 2017, the parties agreed "that, in view of the conclusions reached in the Court Order, the claims and first (breach of contract) counterclaim asserted herein are arbitrable. The parties disagreed as to whether the other counterclaims are arbitrable." (Procedural Order No. 1, ¶1.) In its post-hearing brief, Claimant contended that non-parties (such as PR affiliates Copperline Condominiums, MC Real Estate, MC Construction, MCI, C&M Construction Management and Point Ruston Apartments, none of which is a party to this arbitration) cannot assert claims or counterclaims here, but conceded that "[a]ll other claims and counterclaims are arbitrable." (Cl. Post-Hearing Brief, at 6.) Respondents contend that all claims and counterclaims addressed herein are arbitrable. (R. Post-Hearing Br., at 126-30.)

As discussed above, "[t]he relevant arbitration clauses and the prior Court Order provide, and the parties agreed at the Preliminary Hearing, that this arbitration shall be conducted in accordance with the AAA's Commercial Arbitration Rules ("Rules"). . ..)" (Procedural Order No. 1, ¶2.) Those Rules provide, in their Section R-7, as follows:

> **R-7. Jurisdiction**
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause

> forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
>
> (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

Based on this record, and exercising the authority granted to me under Section R-7 of the Rules, I make the following findings as to the arbitrability of the claims and counterclaims asserted in this case:

(i) No claims or counterclaims have been asserted in this arbitration on behalf of Copperline Condominiums, MC Real Estate, MC Construction, MCI, C&M Construction Management, Point Ruston Apartments or any other non-parties.

(ii) All of the claims and counterclaims asserted in this arbitration by the parties listed in the caption above and addressed in this award constitute disputes "concerning this Agreement" within the meaning of the relevant arbitration clauses, referenced above, in the two subcontracts. Thus, I agree with and adopt the conclusions reached in the Court Order concerning the claims and parties covered by that Order. The counterclaims asserted subsequently in this arbitration that were not expressly addressed in the prior Court Order are all similarly arbitrable because they also allege disputes "concerning" the two subcontracts, and are therefore arbitrable for the same reasons discussed by the Court Order as to Claimant's claims. This finding applies to all of the counterclaims, whether based on the subcontracts, the Notes, the issues raised by the liens that were filed, and to the common law fraud and other tort-based and statute-based counterclaims, all of which "concern" the subcontracts and all of which raise issues that are inextricably intertwined with issues already determined to be arbitrable by the Court Order.

(iii) As presented in their post-hearing briefs, all parties have stipulated that the claims and counterclaims of all of the parties captioned above are arbitrable here.

(iv) I agree with and adopt the Court Order's conclusion that the FAA applies to this case "because there is a valid agreement to arbitrate and a sufficient nexus with interstate commerce exists to implicate the substantive provisions of the Federal Arbitration Act." (Court Order, at 2.)

(v) By expressly specifying and requiring applicability of the AAA's Commercial Arbitration Rules, including Section R-7 of those Rules, to this arbitral proceeding, the parties'

subcontracts clearly and unmistakably delegated these arbitrability determinations to the arbitrator, not to the judicial system, for resolution.[1]

Based on these findings, I conclude that all of the claims and counterclaims asserted herein and adjudicated below are arbitrable in this arbitration proceeding.

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[1] Although the holding addressed a narrower point, the recent decision of the U.S. Supreme Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527, 529-31, (2019) provides a useful discussion of the legal context relevant to this finding:

> Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-944 (1995). . . Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." [*Rent-A-Center*, 561 U.S., at 67,] at 68-69; see also *First Options*, 514 U.S., at 943. We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S., at 70. . ..

The *Schein* opinion did not reach the question of whether a contract provision requiring application of AAA Rules constitutes a clear and unmistakable agreement to delegate issues of arbitrability to the arbitrator, but numerous lower courts have so held. *See, e.g., DISH Network LLC v. Ray*, 900 F.3d 1240, 1245-48 (10th Cir. 2018) *(citing cases); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 787 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006). Based on the record presented in this case, I find that the parties' subcontracts at issue here did so.

III. DISCUSSION.

At the initial Preliminary Hearing held on August 18, 2017, the parties and I agreed that the award in this case would be issued "in a narrative, reasoned format that briefly explains the principal reasons for the relief awarded." (Procedural Order No. 1, ¶ 14; Rules, Section R-46.) Accordingly, the discussion that follows in this Part III briefly explains the principal reasons for the relief awarded below in Part IV of this award.

In overview, this Final Award confirms and incorporates the six main decisions made in the Interim Award:

First, the counterclaim alleging common law fraud was not established. The evidence presented did not prove by "clear, cogent, and convincing evidence" that the two subcontracts were fraudulently induced or the operation of a common law fraud actionable under Washington law later, during the change order/performance phases of the two subcontracts, either before or after Mr. Hutchinson's termination.

Second, Claimant proved its claims based on the subcontracts, Notes and on the mechanic's lien filed on the Garage. Respondents' defenses and counterclaims challenging enforceability of the subcontracts and Notes at issue here are denied. The nature of these claims, and the manner in which they were presented, requires that Claimant's total recovery on these claims not exceed its total award on the subcontract-based claims. The specific relief awarded on these claims is set forth in Part IV below.

Third, Claimant's claims based on the Building 1A lien and Claimant's claim for tortious conversion were not established, and are denied.

Fourth, the counterclaim alleging that Serpanok aided and abetted breaches of fiduciary duty by Mr. Hutchinson was established, but as to a narrower and more limited set of damages than the more expansive damages sought by Counterclaimants. The counterclaim for improper filing of the Building 1A lien is also granted. The specific relief awarded on these counterclaims is set forth in Part IV below.

Fifth, all of the remaining counterclaims are denied.

Sixth, the evidence established that Claimant committed an improper act of spoliation of evidence and related discovery abuse during this arbitration. The Interim Award determined that the appropriate sanction for this discovery misconduct is a monetary sanction that fully compensates Respondents for all attorneys' fees and other expenses reasonably incurred due to the misconduct. The Interim Award directed additional briefing on the appropriate quantification of such sanction, which was timely submitted by the parties and has now been reviewed and considered. The amount of the sanction is set below.

In addition, this Final Award makes five additional decisions not previously addressed in the Interim Award.

First, the Respondents' Motion for Reconsideration is denied, for the reasons discussed below.

Second, Respondents' application for an award of sanctions on account of spoliation of evidence and discovery abuse by Claimant is granted, and set at $500,000, as discussed below.

Third, Claimant's application for an award of pre-award interest on its successful subcontracts-based and Notes-based claims, and on its successful lien-based claim on the Garage building, is granted, as discussed below. Respondents' application for additional bond costs on its counterclaim for improper filing of the Building 1A lien is also granted.

Fourth, this Final Award decides and resolves the issues raised by the parties' cross-motions for awards of fees and costs. Claimant is awarded $1,302,951.29 for its attorneys' fees and expenses (exclusive of AAA charges, which are addressed separately below) reasonably incurred on the claims and counterclaims related to the two subcontracts and the Notes against Respondents POINT RUSTON, LLC and POINT RUSTON PHASE II, LLC. Claimant is also awarded $593,919.61 for its attorneys' fees and expenses reasonably incurred on the claims and counterclaims related to the Building 1A subcontract against Respondent CENTURY CONDOMINIUMS, LLC as co-obligor on that contract. The total amount recovered by Claimant on these awards for fees and costs may not exceed $1,302,951.29. No fees or costs are awarded to Claimant against Respondent MICHAEL COHEN. Respondents' application for an award of fees and litigation expenses in their favor is denied.

Finally, the Final Award assesses the fees, expenses and arbitrator compensation incurred during the case. (*See* Rules, Sections R-47(c), R-53, R-54 and R-55.) Such expenses are awarded to Claimant against all Respondents except Respondent MICHAEL COHEN.

The specific relief awarded on these issues is set forth in Part IV below.

A. <u>The Counterclaim Alleging Common Law Fraud</u>.

Under Washington law, nine essential elements are required to establish a claim of common law fraud. The nine required elements are (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage. *Williams v. Joslin,* 65 Wn.2d 696, 697 (1965) (citing *Michielli v. U.S. Mortg. Co.,* 58 Wn.2d 221 (1961); *Martin v. Miller,* 24 Wn. App. 306, 308 (1979). Each of these elements must be established by "clear, cogent, and convincing evidence," as opposed to the less stringent and more usual "preponderance of the evidence" standard applicable to the contract-based claims and other

counterclaims at issue in this arbitration. *See Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166 (2012), *citing cases*.

Applying those standards here, the common law fraud counterclaim was not established. The principal reasons for this conclusion are as follows:

The evidence presented in support of the common law fraud counterclaim did not establish required items 7, 8 and 9 enumerated above (actual and reasonable reliance, and consequent damage) by "clear, cogent, and convincing evidence." In particular, the evidence presented did not establish that either of the two subcontracts at issue was fraudulently induced. The evidence did not establish that the terms of the two Serpanok subcontracts, as originally executed, damaged Counterclaimants by requiring them to pay a higher price for the specified work than they could have obtained by contracting with a different subcontractor or that Counterclaimants had non-speculative and then-available options with other willing contractors to do the specified work for less than the parties agreed upon in the two Serpanok subcontracts. The evidence established rather that Respondents initially saved millions by choosing to contract with Serpanok, and that at the time of contracting PR management personnel beyond just Mr. Hutchinson were pleased with the pricing alternatives offered to them under the two subcontracts, as compared to other alternatives then available to them. In this regard, the testimony of and concerning Mr. Santory was important evidence. (*See, e.g.,* Ex. 72: next closest bid to Serpanok's on Building 1A was $4.9 million higher, prompting Mr. Santory to remark "we are looking really good for this. . .YIKES;" the evidence presented concerning the Garage subcontract was less dramatic but also did not establish that the terms of that subcontract, as finalized, damaged PR Phase II when compared to its other alternatives documented in the evidence.)

The evidence presented also did not establish the common law fraud alleged in the counterclaim for the time period after Mr. Hutchinson's departure in November 2015. In particular, the evidence presented failed to establish any of required items 7, 8 and 9 discussed above by "clear, cogent, and convincing evidence" for the time period after Mr. Hutchinson's termination. Rather, the evidence demonstrated that the choices made by Respondents during that time period were made by PR management personnel other than Mr. Hutchinson, including Messrs. Santory and Cohen, outside the time period when continued reliance by Respondents on the earlier alleged misconduct of Serponak/Hutchinson remained reasonable, and failed to demonstrate that such choices were made based on either actual or reasonable reliance on the alleged fraudulent misconduct, or that the alleged earlier misconduct caused Respondents any "consequent damage" during the time period after Mr. Hutchinson's departure. In particular, the evidence established that Mr. Cohen and Mr. Santory negotiated and approved Change Orders 9 and 10 on the Building 1A subcontract and Change Orders 4-6 on the Garage subcontract after Mr. Hutchinson had been terminated and after any reasonable reliance period had come to an end. On balance, the evidence indicated that Respondents actually were, and reasonably should have been, on notice of misconduct by Mr. Hutchinson by the time of his termination in November 2015. Mr. Cohen testified that he was uncomfortably put on notice during mid-2015 by Ozark Bank's top management of numerous change orders

that imperiled the Project's continued bank financing, that he then investigated these and learned that Mr. Hutchinson had indeed approved a number of such change orders, and that this led Mr. Cohen to initiate follow-up inquiries that eventually contributed, together with other information, to his decision to fire Mr. Hutchinson in early November 2015. Ozark Bank's conduct between that initial communication to Mr. Cohen and the time of Mr. Hutchinson's departure should have impelled such inquiries. The evidence also established that Respondents took a number of actions following Mr. Hutchinson's departure to begin investigating possible claims, including possible claims against Serpanok. (*See, e.g.,* Ex. 458.)

The evidence further established, however, that Respondents simultaneously chose, by executing numerous additional subsequent change orders, by insisting that Serpanok continue to perform under the subcontracts, by accepting the valuable work done for them by Serpanok after Mr. Hutchinson's termination, through various other conduct continuing performance of the two subcontracts, and then later by asserting subcontract-based counterclaims in this arbitration, to ratify and insist upon continued performance of the two subcontracts.[2] For these reasons, the evidence presented in support of the common law fraud counterclaim did not establish any of required items 7, 8 or 9 discussed above by "clear, cogent, and convincing evidence" for the time period subsequent to Mr. Hutchinson's termination.

The evidence also ultimately fell short as to whether a more limited common law fraud was proven to have operated during the time period following execution of each subcontract that came to an end with Mr. Hutchinson's termination in November 2015. At the end of the day, the evidence did not establish item 9 ("consequent damage") as to this narrower time period. As discussed below, detailed review of the merits of the various back charge claims does not support Respondents' claims that they were obliged to overpay for extra work on either subcontract. As Mr. Blake persuasively explained, a large number of the alleged overpayment items appropriately should have resulted in the credits extended to Serpanok, and others constituted credits extended in appropriate and customary "horse trading" in return for concessions by Serpanok on other items. Although called as a witness principally to offer analyses of the back charge issues, Mr. Blake's testimony so pervasively rebutted the claims of back charge damages and overpayments, on their merits, that his testimony turned out to be significant on the fraud counterclaim as well: Based on Mr. Blake's testimony, and the other evidence referred to in that testimony, I could not find that Counterclaimants proved "resultant damage" on their common law fraud counterclaim by "clear, cogent, and convincing evidence" even for the narrower November 2013-November 2015 time period. In addition, the evidence concerning Respondents' conduct ratifying and insisting on continued performance of the two subcontracts following Mr. Hutchinson's departure, discussed above, after the reasonable reliance time period had ceased, also cut against a finding that the alleged fraud caused "consequent damage" during the earlier November 2013-November 2015 time period. That

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[2] Although this conduct did not waive Counterclaimants' right to assert a later monetary claim against Serpanok on account of the alleged misconduct, Respondents' conduct subsequent to Mr. Hutchinson's departure does preclude their ability to seek rescission at this time. It is not reasonably possible, at this late date, to restore the *status quo ante*.

evidence established that Respondents were insistent on continued performance of the two subcontracts, after firing Mr. Hutchinson, and that PR management personnel who took over after Mr. Hutchinson later approved various additional change orders that had the effect of accepting judgments and determinations made previously during the November 2013 – November 2015 time period. On balance, the totality of the evidence presented was just not strong enough to support a finding that the required element of "consequent damage" had been proven as to the change orders negotiated and contract administration performed before Mr. Hutchinson left.

The "clear, cogent, and convincing evidence" standard is a stringent one, and, in my judgment, the evidence offered at the Arbitration Hearing in support of the counterclaim alleging common law fraud did not meet that exacting standard. The two subcontracts were not shown to have been fraudulently induced, and the change orders obtained later were not proven to have been procured by reason of a common law fraud actionable under Washington law. Based on this conclusion, Respondents' request for an order of contract cancellation (declaring the subcontracts void or voidable) based on alleged fraudulent inducement of the original subcontracts is denied, as is their request for a disgorgement-of-profits remedy on account of the common law fraud alleged as to later time periods.

Based on the conclusions discussed above, I do not reach or decide whether the evidence presented by Counterclaimants in support of their common law fraud counterclaim satisfied required elements 1-6 above under Washington law. I will say that the evidence proved Mr. Kunitsa and Mr. Hutchinson engaged in a course of conduct that I found deplorable and do not condone.

Finally, the evidence did not establish that the Notes were fraudulently induced, or that Respondent PR's performance under the Notes was procured by an actionable fraud. The evidence established that the Notes were sought and promoted by a broader group of PR management than just Mr. Hutchinson, including Mr. Cohen, and that PR management did so based mainly on its own judgments and imperatives in order to find a practical way to keep the project proceeding on schedule despite persistent financing and payment delays, for which Serpanok was not responsible. In addition, as discussed in more detail below, the evidence established that the Notes were not intended to be separate "investments," but were intended instead to function as additional guaranties of amounts past-due under the subcontracts. Accordingly, insofar as the common law fraud counterclaim addressed the Notes, the evidence presented failed to establish any of items 7, 8 or 9 discussed above by "clear, cogent, and convincing evidence."

Based on these considerations, the common law fraud counterclaim must be denied and dismissed with prejudice.[3]

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[3] Counterclaimants requested that I draw an adverse inference of fraudulent intent against Serpanok due to the act of spoliation and discovery abuse discussed below. Such an adverse inference sometimes may be useful, in appropriate circumstances, to help resolve ambiguities in the evidence

B. The Claims and Counterclaims Based on the Subcontracts.

The evidence presented at the Arbitration Hearing established that Serpanok is entitled to recover on its claims against PR Phase II and Century for breaches of the Building 1A subcontract and against PR Phase II for breach of the Garage (Building 9/11) subcontract. The evidence established that the work covered by Serpanok's claims based on the subcontracts either fell within the scope of work covered by the respective subcontracts as originally agreed or constituted extra work authorized under subsequently-signed and binding change orders. The evidence also established that the work covered by these claims was satisfactorily performed and accepted by Respondents while the subcontracts were being performed. Finally, the evidence established that Serpanok properly invoiced, but has not been paid, principal amounts totaling $852,740 on the Building 1A subcontract, and $2,236,847 on the Garage (Building 9/11) subcontract.

Two disputes presented particularly important issues raised by the claims and counterclaims based on the subcontracts. The first of these related to the scope and effectiveness of Change Order 10, relating to the Building 1A issues. The second related to whether Serpanok was prevented by Respondents from completing its work on the Garage under the Building 9/11 subcontract, or whether Serpanok wrongfully abandoned the site before that work was completed,

On the first of these issues, as also discussed above, the evidence established that following Mr. Hutchinson's termination in November 2015 Respondents' management, including Messrs. Cohen and Santory, chose to insist on continued performance of the two subcontracts, demanded that Serpanok continue to perform under the contracts, accepted the considerable benefits that work conferred on Respondents, and executed numerous subsequent change orders. One of these was Change Order 10, (Ex. 22), which by its terms specified an agreed resolution of a long list of disputed extra work and pricing items then remaining at issue under the Building 1A subcontract. On balance, the evidence established that this change order was intended to constitute a binding contractual resolution of all of those open items. The most important evidence in this regard was the plain and clear wording of the change order as executed (which expressly stated that it constituted a "final CO accounting for 1A," Ex. 22), the fact that Mr. Cohen signed it in that form in June 2016, Section 17.1 of the subcontract[4] read together with Section 4.2 ("All provisions . . . of this Agreement

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presented. I decline to draw the requested inference here, however, because drawing such an inference would not help to prove or disprove any ambiguous claims or issues. The requested inference would go to Mr. Kunitsa's/Serpanok's intent and would not tend to prove or disprove the different points on which I find the evidence to have been lacking – namely, whether Counterclaimants proved actual and reasonable reliance and "consequent damage." As discussed below, I do find that a monetary sanction is appropriate here based on the spoliation episode.

[4] The written subcontracts "constitute the entire understanding and agreement between Contractor and Subcontractor. . .and supersede all prior written or oral understandings and agreements . . .Except as incorporated in writing into the Contract Documents there are no representations,

shall apply equally to any subsequent Change Orders. . . ."), the communications exchanged between the parties immediately before the change order was executed (including Ex. 61), and Respondents' very substantial delay in later attempting to repudiate the change order. The evidence established that the parties objectively manifested a mutual intention at the time the change order was executed indicating that the change order was intended to be a binding and effective contractual resolution of the listed items according to its terms. The evidence did not establish that the parties mutually intended the change order to become effective only if companion or subsequent agreements on other points, such as lien releases, were also executed separately. The wording used in the change order was unambiguous in this respect. Accordingly, I find that Change Order No. 10 was mutually intended to constitute an agreed contractual resolution of the particular scope of work and pricing items expressly addressed in that change order. I further find, however, that Change Order 10 was intended only to resolve such contract-based disputes, and was not intended to work as a waiver or release of Counterclaimants' rights to assert other claims not based on the subcontract, such as tort-based claims for monetary relief on account of misconduct allegedly committed by Serpanok during the time period prior to execution of the change order. My awards on those tort-based claims are discussed elsewhere in this award.

As to the second of these issues, the evidence established that during the time period from mid-March 2016 running into mid-May 2016 Respondents improperly prevented Serpanok from completing its work on the Garage subcontract by refusing to execute a change order authorizing Serpanok to perform necessary extra work at Grid Line 1. The photographs presented at the Arbitration Hearing, Mr. Blake's testimony and the evidence presented concerning Mr. Santory's conduct on this point (*see, e.g.,* Ex. 149, in which Mr. Santory, on March 18, 2016, declared the Grid Line 1 extra work approved and improperly directed, in an email, Sepranok to perform that work at a time when no signed change order existed), taken together, corroborated Mr. Kunitsa's testimony that the Grid Line 1 extra work was appropriate and needed to be done before Serpanok could complete its work on the Garage subcontract. The evidence also established that three days later Mr. Kunitsa and Mr. Cohen re-confirmed the subcontract's requirement, discussed below, that no extra work was to be done without a signed change order. (Ex. 409). Despite that agreement, the evidence did not establish that Respondents ever executed the change order necessary for Serpanok to proceed with the Grid Line 1 work. By mid-May 2016 Serpanok decided not to wait any longer, demobilized and left the site because it had not received the change order. The Garage subcontract is clear that all directions by the Contractor to the Subcontractor to perform extra work must "be set forth in a Subcontractor Change Order pursuant to the Contract Documents, using the form attached as Attachment B. . . All change orders must be approved and signed by Contractor or its authorized agent." (Exs. 119/1204, Article 4). Section 3.1 of the subcontract provided that "**TIME IS OF THE ESSENCE** with this Agreement." (*Id.,* Section 3.1; emphasis in original). This obligation applied to both the Contractor and to the Subcontractor. Given these provisions, Respondents' failure to approve the Grid Line 1 change order within a time period compliant

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understandings, stipulations, agreements or promises, oral or written, with respect to the matters addressed in the Contract Documents. . . ." (Exs. 10/1072, Section 17.1.).

with the "time is of the essence" obligation during the mid-March to mid-May 2016 time period constituted an anterior material breach of the subcontract that excused Serpanok from further performance under the contract. *See Colo. Structures v. Ins. Co. of the West,* 161 Wn.2d 577, 588-89 (2007). In these circumstances, Serpanok committed no breach by eventually concluding that it did not need to wait forever, demobilizing and leaving the job site. (Respondent's breach prevented Serpanok from completing a small portion - approximately $100,000 - of its remaining scope of work and also prevented it from billing for the unfinished portion of its work. *See* Exs. 119/1204, Section 1.2; Tr. 315-30. Serpanok did not subsequently invoice for the unfinished work and its claims under the Garage subcontract appropriately do not seek reimbursement for that work.) For these reasons, I have concluded that the alleged improper termination alleged by Respondents was not established and does not bar any portion of Serpanok's claims based on the Garage subcontract. For the same reasons, Respondents' request for a back charge or for counterclaim relief covering the costs Respondents incurred to hire another contractor to finish the Garage subcontract after Serpanok demobilized were not established and are denied.

Turning next to the other subcontract-based issues, I find that the defenses and counterclaims concerning the various alleged back charges were not established. As discussed above, the Building 1A items addressed in Change Order 10 were resolved by agreement of the parties in that change order. As discussed separately above, the counterclaim alleging that the various disputed change orders were fraudulently procured also was not established. Based on the requirements of Sections 17.1 and 4.2 of the subcontracts, the executed written change orders resolved the items addressed in those agreements by party agreement on the terms set forth therein and without oral or informal corollaries or exceptions. The persuasiveness of many of the back charge claims was diminished by their late assertion. Finally, on their merits, I preferred and accepted the testimony of Mr. Blake on the disputed back charge claims. In reaching these conclusions, I found Mr. Blake to be an excellent and persuasive witness.

In particular, the evidence presented did not support Respondents' claims that Mr. Hutchinson's involvement in the change order process caused Respondents to overpay by approximately $1.8 million for unwarranted extra work charges on the Garage and by approximately $580,000 for Building 1A extra work. (R. Post-Hearing Br., at 87-88.) The specific issues raised in all of the many back charge claims are too numerous to discuss all of them here individually, but a review of four of the largest dollar-value items will illustrate:

(i) Respondents' claim (Building 1A claim no. 15 - work done by Stegin - $391,082.81) that Mr. Hutchinson improperly ordered Stegin to do some of Serpanok's work without requiring Serpanok to agree to an appropriate offsetting credit to Respondents was disproven by the evidence showing that Change Order 6, approved by Mr. Cohen, "horse traded" such a credit in return for not allowing Serpanok a credit for extra work done on portions of Floor 5 due to changes in the original slab width requirements. That claim was thus resolved by party agreement, involving and approved by Mr. Cohen, after Mr. Hutchinson's departure, in Change Order 6 and is further barred by Change Order 10, construed above, and approved by Mr.

Cohen even later in the contracting process. As discussed above, it was not established that either of these change orders was fraudulently procured.

(ii) Respondents' claims (Building 1A claim nos. 13 ($95,806.01), 14 ($103,897.63) and 26 ($162,760.27)) that Mr. Hutchinson improperly failed to follow up on breaches of warranty allegedly committed by Serpanok in its work on the Cinema floor, 2R slab repairs and certain residential floors were shown during Mr. Blake's testimony to be without merit for multiple reasons. The evidence also did not establish that it was Mr. Hutchinson, as opposed to others in PR management, who caused PR to adopt the policy of systematically not testing for newly-poured floor flatness or levelness - a policy that, among several reasons, effectively made it impossible for Respondents to prevail on these back charge claims.

(iii) Respondents' claims that Mr. Hutchinson improperly agreed to change orders compensating Serpanok to accelerate its work (Building 1A claim no. 9 - shoring rental - ($99,976.85), and Garage claims nos. 3 ($273,750), 13 ($51,382.95), 14 ($84,000) and 16 (23,103.75)) were not established because the evidence established that permitting delays and other factors for which Serpanok was not responsible, not misconduct by Serpanok, caused the delays giving rise to these agreements; in addition, as discussed above, the evidence did not establish that any of Garage Change Order 3 or 4 or Building 1A Change Order 10 was procured fraudulently. Absent such a finding, those change orders resolved these items contemporaneously by party agreement. The evidence also established that Mr. Cohen was personally involved in negotiating portions of Change Order 4, which was signed by Mr. Santory, and that Mr. Santory privately assessed Serpanok's work on the Garage in a way that is very difficult to reconcile with Respondents' current contentions on the acceleration disputes. (*See, e.g.,* Ex. 469.) As discussed above, Change Order 10 resolves these issues as to Building 1A.

(iv) As discussed earlier, Respondents' claim (Garage claim no. 4 - ($650,930)) that they were improperly required to hire another contractor to complete Serpanok's unfinished scope of work on the Garage following the Grid line 1 dispute failed because Serpanok's decision to demobilize was excused by Respondents' prior material breach.

In lieu of discussing all of the other items on which Respondents' contentions of back charges for overpayment damages were based separately and at undue length, suffice it to say that Mr. Blake's testimony, combined with the exhibits there referenced, precluded any finding that Respondents were improperly required to overpay for extra work on the two subcontracts.

The subcontract-based defenses and counterclaims concerning liquidated damages are also denied. The Garage subcontract, properly construed, expressly excluded any claims for liquidated damages against the Subcontractor. (Exs. 119/1204, *compare* pre-printed Section 5.2 *with* the specifically-negotiated Attachment A, which governed Scope of Work.) *See Green River Valley v. Foster,* 78 Wn. 2d 245, 249-50 (1970) (specifically negotiated and typed provision should govern over pre-printed boilerplate clause because courts must give effect to the manifest intent of the parties)(*citing cases*); *see also* 11 *Williston on Contracts,* §32.13 (4th

ed.).[5] The evidence also did not establish the liquidated damages claims on their merits either as to the Garage or as to Building 1A; rather, the evidence failed to establish that Serpanok delayed completion of the work on either subcontract. As discussed above, Serpanok was prevented from completing the small amount of work remaining on the Garage contract by Respondents' prior breach and unreasonable delay in issuing a change order covering the Grid Line 1 extra work. The evidence did demonstrate that a number of delays occurred during the work on the two subcontracts, but did not establish that conduct by Serpanok in derogation of its contractual duties, as opposed to permitting, financing and other delays for which Serpanok was not responsible, caused those delays; on the contrary, substantial evidence was presented demonstrating that Serpanok's cooperation was critical to accomplishing completion of Building 1A in time to permit opening of the Cinema on the revised schedule urged as essential by Respondents. The evidence also indicated that, allowing for the delays not caused by Serpanok, Building 1A was completed on time. (Century Corp. Dep. by Mr. Cohen, at 177-78; *see also* Tr. 556-57, 1020-21.) Finally, the liquidated damages claim was undercut by acknowledgments from Mr. Cohen as of February 2016 that Serpanok's work was "as good or better than most and certainly quicker than most" (Ex. 305), the fact that the claim as presented did not include any sort of critical path or schedule analysis, *see G.M. Shupe v. United States,* 5 Cl. Ct. 662, 728 (Fed. Ct. Cl. 1984) and by the very late assertion of the claim. In that last regard, although I do not find a waiver, I do find that the fact this claim was not more vigorously asserted sooner diminished its persuasiveness.

Respondents' defenses and counterclaim based on the implied duty of good faith and fair dealing also were not established. A party alleging breach of contract, including a claim of breach of the implied duty of good faith and fair dealing, must establish three elements by a preponderance of the evidence: "(1) a duty imposed by the contract that (2) was breached, with (3) damages proximately caused by the breach." *Cachiotti Properties, LLC v. Phillips,* 200 Wn. App. 1001 (2017). The first of these requirements was established because, under Washington law, every contract contains an implied duty of good faith and fair dealing. *Badgett v. Sec. State Bank,* 116 Wn.2d 563, 569 (1991). Based on the determinations made above, and the other evidence presented, however, Respondents failed to establish the third of these required items - that Serpanok's alleged breach of the duty of good faith and fair dealing resulted in "damages proximately caused by the breach." As found above, the evidence established that the work covered by Serpanok's claims based on the subcontracts either fell within the scope of work covered by the respective subcontracts as originally agreed or constituted extra work authorized under subsequently-signed change orders, was satisfactorily performed and accepted by Respondents while the subcontracts were being performed and

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[5] Respondents argued (R. Post-Hearing Br., at 95, n. 32) that Section 5.2 should govern over the subcontract's expressly-negotiated Scope of Work (Attachment A) because Section 17.1 provides that the terms of "this Agreement" prevail over inconsistent provisions of "Contract Documents." This argument was not persuasive. Section 1.1 defines "this Subcontract and the attachments included herewith" as "the "Agreement"" and separately defines "Contract Documents" as "the plans and specifications of the Project." Accordingly, Attachment A constitutes an integral and specifically negotiated part of "the Agreement," and does not constitute a lesser "Contract Document" for purposes of Section 17.1.

was accurately invoiced at the prices agreed upon by the parties. As discussed above, the counterclaims for back charges and delays/liquidated damages were not established. The only instance of work promised but not performed was the small amount of work remaining unfinished at the Garage following the Grid Line 1 dispute; as discussed above, I have found that Serpanok was excused from any duty to perform that work by reason of Respondents' prior material breach of the subcontract. Based on these determinations, and the totality of the evidence presented, it was not established that the alleged breach of the duty of good faith and fair dealing proximately caused Respondents any recoverable damages with respect to the work provided under the subcontracts. Finally, several of the appreciative messages sent to or about Serpanok during the course of its work by Respondents' management personnel other than Mr. Hutchinson further undercut the breach of good faith claim. (*See, e.g.,* Ex. 469 (Mr. Santory privately to Mr. Cohen on December 1, 2016: "We would of never been able to pull off what we did on building 11 without him [Sepranok/Kunitsa]"); Ex. 234; Ex. 299; Ex. 328; Ex. 299 (Mr. Cohen: "I again am very appreciative of your work and ability"); Ex. 305 (Mr. Cohen: "I have no doubt that you could do our Lot 18 project as good or better than most and certainly quicker than most if you wanted to. We enjoy working with you and hope we can do so for many more projects. . .You are doing well in this latest round of garage work, thank you!").

For these reasons, I award in favor of Claimant on its subcontract-based claims, including its claims to recover retainage.[6] For the same reasons, I award against Respondents on their subcontract-based defenses to those claims and on their subcontract-based counterclaims.

C. The Claims and Counterclaims Based on the Notes.

The evidence presented at the Arbitration Hearing established that Serpanok is also entitled to recover on its claims against PR based on Notes 2 (Ex. 201) and 3 (Exs. 199 and 202), and that Respondents' defenses and counterclaims based on the Notes must be denied. The evidence established that Serpanok is entitled to recover $701,263 in principal amount against PR on its claim under Note 2 and an additional $848,000 in principal amount on its claim against PR under Note 3, plus additional interest on both sums in amounts to be set during the Final Award phase of this arbitration. The nature of the proof offered by Claimant on the these

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[6] The evidence established that Serpanok completed all of its work on the Building 1A subcontract. In the circumstances found above concerning the Grid Line 1 dispute, Serpanok's failure to complete a small amount of remaining work on the Garage subcontract following Respondents' breach of that contract does not bar its claim for retainage. The retainage amounts sought were earned prior to that breach and, as discussed above, Serpanok did not bill for retainage on or any other portion of the unfinished work. The evidence established that Serpanok substantially completed all of the work on the Garage contract that it was permitted to do up to the point of Respondents' breach. Exercising my discretion under Section R-47(a) of the Rules, I find that it is "just and equitable and within the scope of the agreement of the parties" to award in favor of Serpanok on its retainage claims under both subcontracts, and that it would not be "just and equitable" to direct a forfeiture of Serpanok's retainage claims based on the Garage subcontract where Serpanok's failure to complete all work under that subcontract was caused by Respondents' prior material breach.

Notes claims, however, established that the Notes were not intended to be separate "investments," but were intended instead to function as additional guaranties of amounts otherwise due under the subcontracts. This conclusion limits and requires coordination of any recovery Claimant might seek on its Notes-based claims with its recovery rights based on the subcontracts. *See* Part III.M below.

The principal reasons for these conclusions are as follows: First, I concluded that the specific language used in the two Notes on which these claims are based is ambiguous on the key point in dispute – namely, whether the Notes were intended as guaranties of the subcontract obligations or whether they were intended as separate, free-standing investments intended to pay off, at execution, comparable past due amounts of invoices then outstanding under the subcontracts. Note 2, for example, recited that it was issued "FOR VALUE RECEIVED, including those credits toward invoices indicated at Exhibit "A" hereto. . ." but then attached no Exhibit "A." (Ex. 201). Note 3 similarly recited that it was issued "FOR VALUE RECEIVED, including the credits toward invoices indicated at Exhibit "A" hereto. . ." but then attached an Exhibit "A" reading "In consideration of this Note, credits totaling $800,000 are recognized against invoices as indicated below:" but then attached no "invoices as indicated below." (Ex. 202). On balance, I found this language ambiguous and apparently incomplete. Based on that determination, I concluded that it was appropriate to follow the rules of contract construction and interpretation specified under Washington case law for dealing with ambiguous contract language. *See Hearst Comm's Inc. v. Seattle Times*, 154 Wn.2d 493, 502-04 (2005)(*citing cases).*

Second, applying those standards, I concluded that the parties intended these Notes to be guaranties of amounts otherwise due under the subcontracts rather than as more traditional notes issued for investment purposes. The most important evidence supporting that determination included the evidence establishing that Respondents urged the Notes on Serpanok as a device intended to persuade Serpanok to keep working despite the fact that payments to Serpanok at the time under the subcontracts were massively late (over $2 million in arrears on each subcontract at the time Note 2 was issued, according to Exs. 4 and 5), and Mr. Kunitsa's testimony, which I found persuasive, that no one in his position at the time would knowingly agree to substitute a mere promise of future payments from a PR affiliate not even a party to the subcontracts in place of outstanding invoices for work already performed under subcontracts where the Contractor had plausible prospects of eventual bank financing. This evidence shed important light on the "subject matter and objective" of the ambiguous contract language at issue, "the circumstances surrounding the making of the contract," and "the reasonableness of the respective interpretations urged by the parties." *Hearst, supra,* 154 Wn.2d 493, at 504. "The subsequent acts and conduct of the parties" also supported the interpretation of the Notes adopted above. *Id.* The evidence on this score established that both parties engaged in a course of conduct during their accounting and administration of the Notes, including the superseded Note 1, that treated payments made under them in a manner consistent with guaranties of amounts due under the subcontracts rather than as investments that paid off prior invoices upon execution. (*See, e.g.*, Exs. 2 and 4, and Mr. Rabern's testimony concerning them; Ex. 1242 and the testimony concerning it). The absence of any contemporaneous lien releases upon execution of Notes 1, 2 or 3 was also significant in this

regard. In summary, based on the evidence presented on the tools of construction directed in *Hearst*, Claimant demonstrated that the ambiguous language used in the Notes should be construed as guaranties rather than traditional note investments.

An important consequence of this conclusion is that, although Claimant has prevailed on its Notes-based claims, its total recovery on the subcontract-based claims and on the Notes-based claims may not exceed the award made above on its claims based on the subcontracts. See Part III.M below. The Relief awarded in Part IV below so provides.

Counterclaimants' Washington State Securities Act ("WSSA") counterclaim based on the Notes was not established. For the reasons discussed above, I have concluded that the Notes at issue here do not constitute "securities" within the scope of WSSA under RCW 21.20.005(17)(a). Although notes can and generally do constitute securities under WSSA, *see Douglass v. Stanger,* 101 Wn. App. 243, 245, 252-54 (2000), as discussed above the Notes at issue here were issued as guaranties, given by a parent/affiliate of the respective Contractors bound under the two construction subcontracts, to assure the Subcontractor that past-due invoices under the two subcontracts not paid by the original contracting parties would be paid by the parent/affiliate. The evidence established that the "economic reality" of the Notes transactions was that they were not intended as investments by the parties but rather were entered into as ancillary components of ordinary "commercial transactions" - *i.e.,* were intended to assure complete payment of construction subcontract invoices already due to the Subcontractor. *See, e.g., Reves v. Ernst & Young,* 494 U.S. 56, 61 (1990)(discussing factors to be weighed when distinguishing between notes intended as investments and notes intended as commercial transactions); *In Re NBW Commercial Paper Litig.,* 813. F.Supp. 7, 17 (D.D.C. 1992)(*citing cases*). *See also State v. Pedersen,* 122 Wn. App. 759, 765 (2004); *State v. Argo,* 81 Wn. App. 552, 563 (1996). Applying the *Reves* factors to the Notes at issue here,[7] as I have construed them above, and although

[7] The evidence established, in particular, that the Notes here did not have "an investment purpose." The evidence demonstrated that Serpanok was not motivated to agree to the Notes because they constituted an attractive investment but rather assented to them in hopes that they might help Serpanok eventually get paid for construction work already done and at the time seriously past due under the subcontracts. The evidence also established that "the investing public would not view" the Notes here "as investments." Indeed, these Notes transactions would have been unavailable to the investing public generally, but rather constituted an accommodation realistically only of interest to these particular parties, one of which necessarily was a construction subcontractor with seven-figure past due invoices but still willing to continue performing, concerned with completing performance of Serpanok's two construction subcontracts. Although the Notes might have been technically "marketable," the evidence did not support a finding that they were issued for such purpose, and established rather that they were given to assure the Subcontractor that the Contractors' parent and affiliate would step up to make itself available as a guarantor to assure payment of past due invoices on two companion commercial transactions involving its affiliates. Finally, the Notes issued here were so *sui generis* that the absence of a separate "statutory scheme" regulating such notes was hardly persuasive as to the "economic reality" of the transactions. Unlike certificates of deposit or other regularly-traded investments, the Notes here were issued in aid of completing two particular and non-recurring commercial transactions between private parties in transaction-specific circumstances of little

notes in other contexts so often constitute actionable securities that this is rebuttably presumed, I have concluded that here, based on the particular evidence presented in this case, that presumption was rebutted and that the Notes at issue therefore did not constitute securities subject to WSSA.

Finally, the counterclaim for alleged breach of the implied duty of good faith and fair dealing based on the Notes was not established because that claim depended on an interpretation of the Notes rejected above.

D. <u>The Claims and Counterclaims Related to the Liens</u>.

In May 2016, after it demobilized and left the Garage job site following the Grid Line 1 dispute, Serpanok filed mechanics' liens on both Building 1A and on Building 9/11 (the Garage). Serpanok now seeks to recover $1,147,952 on its Building 1A lien and $3,034,030 on its Garage lien but acknowledges that its total recovery must be bounded by the award it receives on its subcontract-based claims. (Serpanok Post-Hearing Br., at 6, 27.) The claim based on the Building 1A lien was not established and is hereby dismissed with prejudice. The counterclaim for improper filing of the Building 1A lien was established, and I award counterclaimant Century $394,116 on that counterclaim, plus additional bond costs incurred since the date of the Interim Award, as discussed below. Claimant's claim based on the Garage lien was established, and I award Claimant $2,236,847 in principal amount, plus interest in an amount to be determined during the Final Award phase of this case, on that claim. Claimant's total recovery on the awards made here on its subcontract-based claims, the Notes-based claims and its claim based on the Garage lien, however, may not exceed the award made above on its claims based on the subcontracts. See Parts III.M and IV.D below.

The principal reasons for these conclusions were as follows:

First, the lien filed May 17, 2016, on Building 1A was invalid from its inception because it was not timely filed. The evidence established that Serpanok completed its work under the Building 1A subcontract in November 2015. (Ex. 1440; Ex. 1529; Tr. 1145-48; Tr. 2673.) Serpanok largely conceded that fact (Cl. Post-Hearing Br., at 28; 1A work was "substantially completed" by then). Accordingly, its lien on Building 1A was not timely filed within the 90 day period required under RCW 60.04.091. *See Intermountain Electric, Inc. v. G-A-T Bros. Constr.*, 115 Wn. App. 384, 390-91 (2003). Serpanok's efforts to rescue the 1A lien by pointing to three discrete items of work allegedly done within the relevant 90 day period were not persuasive. The evidence established that two of these three items – the work performed at the stairwell floor landing (using concrete billed under the Garage subcontract) and the cleaning of certain condominiums, neither of which was invoiced under the Building 1A subcontract) were never

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or no interest to the general public. "[C]onsidered as a whole," application of the *Reves* factors to "the economic characteristics" of these particular Notes requires the conclusion that they should not be characterized as securities covered by WSSA. *See S.E.C. v. Wallenbrock*, 313 F. 3d 532, 537 (9th Cir. 2002).

part of the scope of work specified under the Building 1A subcontract. The third – deck repairs at unit 411 – was warranty work that under Washington law cannot extend the period for filing a lien. *See Wells v. Scott,* 75 Wn. 2d 922 (1969); *Brown v. Mychel Co.,* 186 Wash. 97, 98 (1936). The testimony of Mr. McCarten was persuasive as to all three of these items.

In addition to being improperly filed on the property then owned by Century, the 1A loan was also improperly recorded against property owned by approximately forty condominium owners, who thus became unfortunate victims of the improper lien recording. The evidence established that Century was forced to respond to this situation by recording a lien release bond in the amount of $1,355,252 pursuant to RCW 60.04.161, and has been obliged to hold that amount in escrow, without lawful justification, since February 14, 2017, as well as pay expenses to its surety on the bond. (Tr. 2413-16; Ex. 256; Ex. 1444.) In total, the evidence established that the improper filing of the 1A lien caused Century to suffer recoverable damages under RCW 60.04.181 in the amount of $394,116. (Tr. 2413-16; 3161-63.) I award Century that amount on its counterclaim relating to the Building 1A lien

Claimant's claim based on the Garage lien did not raise similar issues and was established as valid. The evidence established that the Garage lien was timely filed based on prior work done, was not excessive in amount when filed or as compared to the amount awarded above and was not filed in bad faith. In addition, Claimant made certain appropriate concessions concerning the amount of this claim in its Post-Hearing Brief (*see* p. 27). Accordingly, Claimant is awarded $2,236,847 against PR Phase II in principal amount, plus interest to be determined during the Final Award phase of this case, on its claim based on the Garage lien. As discussed below in Part III.H, and as awarded below in Part IV, however, Serpanok's total recovery on its award on this claim, coupled with its total recoveries on the awards made above on the subcontract-based claims and on the Notes-based claims, may not exceed the amount allowed in this award on the subcontract-based claims.

E. <u>Claimant's Claim for Tortious Conversion</u>.

Claimant's claim against Respondents POINT RUSTON PHASE II, LLC and MICHAEL COHEN for tortious conversion of certain of its equipment temporarily left behind at the job site following the Grid Line 1 dispute and Serpanok's subsequent May 2016 departure from the Garage work site was not established. The principal reasons for this conclusion are as follows: First, the evidence established that, at the time of the termination, Point Ruston Phase II was lawfully in possession of the allegedly converted equipment pursuant to the relevant subcontract terms. Mr. Mikhalchuk's testimony, and other evidence, established that at that point the equipment was supporting the unfinished structure and could not be removed safely without likely damage to the building. In these circumstances, Point Ruston Phase II's continued temporary possession of the equipment until it could be removed safely did not constitute the tort of conversion because Claimant failed to establish that the alleged interference was without lawful justification. *See New Hermes, Inc. v. Adams,* 125 Wn. App. 1021 (2005)(*citing cases).* Second, the evidence did not establish that Point Ruston Phase II's temporary possession of the equipment was accompanied by any improper assertion of title to

the equipment hostile to Serpanok's ownership or that Point Ruston Phase II evidenced any intent to deprive Serpanok of the equipment permanently. *See Repin v. State,* 198 Wn. App. 243, 271 (2017). Accordingly, such temporary possession failed to satisfy the requirements of the tort of conversion under Washington law. *See In re Marriage of Langham & Kolde,* 153 Wn.2d 553, 564 (2005). Third, the testimony of Mr. Mikhalchuk as to when the equipment was actually retrieved, coupled with Mr. Rabern's testimony, made the proof offered in support of the conversion damages claim impermissibly speculative.

For these reasons, Claimant's conversion claim is denied and dismissed with prejudice.

F. <u>The Remaining Counterclaims</u>.

1. <u>The Counterclaim Alleging that Serpanok Aided and Abetted Mr. Hutchinson's Breach of His Fiduciary Duties</u>.

Counterclaimants PR, PR Phase II and Century established their aiding and abetting counterclaim for the time period between November 2013 and November 2015. I award them, collectively, $311,894 on this counterclaim. The principal reasons for this award are as follows:

First, the evidence established that Mr. Hutchinson, the PR Construction Manager, owed these Counterclaimants a fiduciary duty, and that Serpanok's Mr. Kunitsa both actually knew (*see* Tr. 1218-21 and the provisions of the two subcontracts) and reasonably should have known this as a matter of ordinary common sense and construction industry practice. *See Wells Fargo Ins. Servs. Inc., USA v. Tyndell,* 2016 WL 7191692 at *4 (E.D. Wash. Dec. 12, 2016); *Eisenbaum v. W. Energy Res., Inc.,* 218 Cal. App. 3d 314, 322 (1990): *Sears Roebuck & Co. v. Am. Plumbing & Supply Co.,* 19 F.R.D. 334, 343-44 (E.D. Wis. 1956)(*citing cases*).

Second, the evidence also established, by a preponderance of the evidence, that Serpanok intentionally engaged in conduct that encouraged, assisted and caused Mr. Hutchinson to commit breaches of his fiduciary duties to his principals. The evidence presented established, by a preponderance of the evidence, that approximately $80,000 was paid to Mr. Hutchinson by Serpanok during the relevant two year period for the improper purpose of attempting to procure favorable change order accommodations, induce Hutchinson to share confidential PR information improperly with Serpanok, and assist Serpanok in submitting change order pricing estimates on the two PR subcontracts based in part on such improperly-disclosed confidential information, or for the purpose of rewarding Mr. Hutchinson for his reports that he had engaged in or would engage in such conduct. Claimant's contentions that these were legitimate payments made to compensate Mr. Hutchinson for "moonlighting" work for Serpanok on unrelated projects were not established or persuasive.

I also find, also by a preponderance of the evidence, that Serpanok's improper payments provided Mr. Hutchinson with substantial encouragement and assistance in breaching his fiduciary duties to his principals, and that during the relevant two-year period the principals did not consent to or ratify those breaches of fiduciary duty.

Whether this misconduct proximately caused Counterclaimants to suffer any recoverable damages, however, presents a much closer question. For the reasons discussed above, the evidence did not establish that Mr. Hutchinson's breaches of fiduciary duty resulted in damages to Counterclaimants during performance of the two subcontracts. In particular, as discussed above, Respondents' claims that Mr. Hutchinson's misconduct improperly caused Respondents to overpay for change order work during the performance of the subcontracts were not established. Counterclaimants established that Serpanok aided and abetted breaches of fiduciary duty by Mr. Hutchinson, but did not establish that those breaches damaged Respondents either by wrongfully inducing the two subcontracts or by causing Respondents to overpay subsequently for change order work. As discussed above, Mr. Blake was a key witness on these points.

I have concluded, however, that Serpanok's improper payments did damage Counterclaimants in a different, and more limited, manner - by denying Counterclaimants the full value and loyalty of their agent and Construction Manager during a two-year time period. To use Mr. Blake's terminology, the agent's duty, under his employment contract with his employer and his duties as agent to the affiliates of his employer, was to "ride for the Point Ruston brand" completely and loyally during his tour of duty as the PR Construction Manager. Serpanok's improper secret payments encouraged Mr. Hutchinson to do less than that for his principals, and thus damaged Counterclaimants by inducing their agent to give less than his full effort and loyalty on behalf of his principals. In addition, the payments Serpanok made to encourage such conduct by Mr. Hutchinson were improper, and were made for a wrongful purpose. The evidence sufficiently established the fact of such damage by a preponderance of the evidence; use of a reasonable estimate is permissible to quantify the precise amount of such damages. *See Espaillat v. Berlitz Sch. of Languages of Am., Inc.,* 383 F.2d 220, 222-23 (D.C. Cir. 1967).

Exercising my authority under Section R-47(a) of the Rules, and based on the evidence presented, I have concluded that an appropriate "just and equitable" remedy for the misconduct demonstrated on this counterclaim is an award of $311,894 to Counterclaimants. This amount, which represents the total of the compensation paid to the agent and the amounts improperly paid to him by Serpanok during the two year period when Serpanok aided and abetted the agent's breaches of fiduciary duty to his principals, constitutes a reasonable estimate of the damages caused by Serpanok's aiding and abetting misconduct. Given the findings made above as to the limited damages proven on this counterclaim, and exercising my discretion under Section R-47(a), I find that it would not be "just and equitable" to grant Counterclaimants' requests for disgorgement or other sweeping restitutionary relief on account of Serpanok's aiding and abetting misconduct. Accordingly, those requests are denied.

2. The Counterclaim Alleging that Serpanok Tortiously Interfered With Respondents' Business Expectancy With Their Construction Manager, Mr. Hutchinson.

This counterclaim was not established because the evidence presented did not establish that Serpanok had sufficient specific knowledge of the contents of the "business expectancy" on which the claim was predicated or, in consequence, that Serpanok possessed the requisite intent to intentionally interfere with that expectancy. *See Life Designs Ranch v. Sommer,* 191 Wn. App. 320, 337 (2015). In addition, even if this counterclaim had been established, the evidence did not establish proof of any "resultant damage," *see Leingang v. Pierce Cty. Med.,* 131 Wn.2d 133, 157 (1997), other than the amounts already awarded above in Part III.F.1 to the same Counterclaimants on the companion aiding and abetting counterclaim.

3. <u>The Counterclaim for "Public Policy Torts" Based on RCW 9A.68.060</u>.

Counterclaimants also alleged a counterclaim for "public policy torts" based on RCW 9A.68.060. This counterclaim is denied for the following reasons.

First, RCW 9A.68.060 is a criminal statute, and is typically enforced by public prosecutorial officials rather by private arbitral tribunals hearing construction disputes. This issue did not receive much, if any, attention either at the Arbitration Hearing or in the parties' post-hearing briefs, but, based on the submissions made earlier concerning the dispositive motions, it has not been clearly established that Washington law recognizes the existence of the "public policy torts" on which this counterclaim depends, or that Washington law permits a private right of action to assert such a civil law tort claim in the circumstances presented here. *See, e.g., Schorno v. Kannada,* 167 Wn. App. 895, 901 (2012); *see also Estate of Kelly v. Falin,* 127 Wn. 2d 31, 38 (1995). Counterclaimant's brief filed in opposition to Claimant's motion for summary judgment "acknowledge[d] that RCW 9A.68.060 does not contain an express private right of action, and the Washington Supreme Court has not addressed whether this statute implies a private right of action." (R. Opp. Br., Dec. 5, 2018, at 20-21.) Although Washington has recognized a "public policy" tort at least once before, based on a different statute and different facts, *see Becker v. Cmty Helth Sys., Inc.,* 184 Wn. 2d 252, 260-61 (2015), Counterclaimants also concede that whether Washington law would do so concerning RCW 9A.68.060 presents "a matter of first impression. . .." (R. Opp. Br., Dec. 5, 2018, at 21, n. 9.) Based on the record presented, it was not sufficiently established that the "public policy" tort on which this counterclaim is predicated actually exists under Washington law. This uncertainty is appropriately a matter for the courts of this state, rather than a private arbitrator, to resolve. Exercising my discretion under Section R-47(a) and other provisions of the Rules, I decline to grant relief based on the alleged "public policy" tort until the courts have resolved this issue more clearly.

Second, criminal statutes such as RCW 9A.68.060 require proof of criminal intent as an essential element of the crime, and apply different standards than those generally used in civil cases to assess whether the requisite criminal intent has been proven. The evidence presented at the Arbitration Hearing, and the parties' briefs and closing arguments, did not adequately address, or establish, whether the criminal intent required to support a conviction under RCW 9A.68.060 was proven here.

Third, even assuming for the sake of argument that Counterclaimants had been able to prove their liability case on this counterclaim, for the reasons discussed above I cannot find that any damages were proven or relief warranted on this counterclaim other than that already awarded on the aiding and abetting counterclaim.

G. <u>The Spoliation Issue</u>.

The evidence established that during the course of this case Serpanok's Mr. Kunitsa engaged in an improper act of spoliation of evidence and related discovery abuse. In brief, Mr. Kunitsa repeatedly misinformed counsel and this Tribunal during the pendency of the case concerning the nature of the information captured and available on Serpanok's Master Builder bookkeeping records. Then, after an effective cross-examination of Serpanok's bookkeeper, Ms. Irina Mikeladze, revealed the true contents of those records, Mr. Kunitsa improperly and surreptitiously attempted to alter those records in order to conceal information he apparently felt would be damaging to Serpanok's case. Additional details of Mr. Kunitsa's misconduct are accurately described in Respondents' Post-Hearing Brief; the misconduct was at least partially conceded in Serpanok's Post-Hearing Brief, at 103.[8]

As discussed in note 3 above, Counterclaimants have requested that I draw an inference of fraudulent intent against Serpanok by reason of this act of spoliation and discovery abuse, which I decline to do for the reasons there explained.

In addition to my authority under Section R-47(a) of the Rules, discussed above, Section R-58 of the Rules provides:

> R-58. Sanctions
>
> (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.
>
> (b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

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[8] I find that Claimant's counsel played no role in Mr. Kunitsa's act of spoliation and related discovery abuse (rather, were victims of it along with Respondents and this Tribunal) and responded in an appropriate, professional and ethical manner once the misconduct came to light.

Applying that provision here, I have determined that the appropriate sanction for Mr. Kunitsa's act of spoliation and discovery abuse is a monetary sanction that fully compensates Respondents for all attorneys' fees and other expenses reasonably incurred on account of the misconduct. Quantification of the amount of this sanction was reserved until the Final Award phase of this case. The Interim Award directed the parties to brief this issue, which the parties timely did following issuance of the Interim Award. As required under Section R-58(b), Serpanok was afforded an opportunity to respond before the amount of the sanction was finalized and the Final Award was issued. Based on my review of these submissions, an appropriate quantification of the monetary sanction is discussed below.

H. Respondents' Motion for Reconsideration.

Respondents' motion for reconsideration submitted July 2, 2019 ("Motion for Reconsideration") raised five main arguments. First, the motion argued that, because the Interim Award found that Claimant aided and abetted Mr. Hutchinson's breaches of fiduciary duty to his employer, the Interim Award should not have allowed enforcement of Claimant's "illegal contracts." (Motion for Reconsideration, at *i,* 7-20.) Second, the motion argued that, because the Interim Award found "that Respondents proved every element of [Washington's] commercial bribery statute," the Interim Award should not have allowed enforcement of Claimant's "illegal contracts." (Motion for Reconsideration, at *i,* 20-23.) Third, the motion argued that the Interim Award erred "in concluding that Respondents failed to prove consequential damages and fraudulent inducement." (Motion for Reconsideration, at *i,* 23-41.) Fourth, the motion argued that the Interim Award erred "in concluding that Respondents failed to prove the damages required for breach of the covenant of good faith and fair dealing." (Motion for Reconsideration, at *i,* 41-44.) Fifth, the motion argued that the Interim Award should be reconsidered because it "condones fraud." (Motion for Reconsideration, at *i,* 45-49.)

Claimant's argument that Section R-50 of the Rules[9] precludes consideration of the Motion for Reconsideration on its merits was not established. As the language of that provision makes clear, this provision of the Rules applies only to final or partial final awards that have "already decided" the "merits of any claim." An interim award is not such an award. *See,* Rules, Section R-47(b)(distinguishing between a "final award" and "other decisions, including interim. . .awards.") Rather, an interim award is a non-final, advance indication, rendered prior to issuance of the final award, of the intended disposition of particular issues in a future final

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[9] Section R-50 provides as follows:

> Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. . ..

award. Final awards, among other things, start the statutory deadlines running for initiating confirmation or vacatur proceedings.[10] For this reason, the Interim Award in the present case expressly provided:

> Since the Final Award has not yet been issued, it is not intended that this Interim Award be regarded as final or subject to review pursuant to 9 U.S.C. §§ 9-11, RCW 7.04A or any other judicial proceedings in connection therewith.

(Interim Award, at 31, ¶3.) Accordingly, Section R-50 does not preclude review of the Motion for Reconsideration on its merits.

Based on my review of the Motion for Reconsideration on its merits, however, the motion is denied.

Claimant's opposition to the merits of the Motion for Reconsideration, submitted August 5, 2019 ("Opposition"), responded to each of the five points, summarized above, raised by the motion. Although, as discussed above, I did not agree with the Opposition's procedural arguments concerning whether the motion should be reviewed on its merits, I did find the Opposition's responses to the substantive points raised by the motion persuasive. In order to keep this award to the agreed format "that briefly explains the principal reasons for the relief awarded," (Procedural Order No. 1, ¶ 14), and avoid undue repetition of the discussion set forth above, I will not repeat all of the responsive substantive arguments made in the Opposition again here. Suffice it to say that I found them persuasive and concluded that they require denial of the motion on its merits.

Because the issues raised by the motion are important to Respondents, however, I would like to add the following additional comments concerning my reasons for denying their motion.

First, I found the motion to be without merit because it was predicated on factual allegations that were not proven at the Arbitration Hearing and, for that reason, rightly rejected

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[10] Based on the determination made above, at 9, (the same determination was made in the Interim Award, at 9, and was not challenged in the Motion for Reconsideration) adopting "the Court Order's conclusion that the FAA applies to this case 'because there is a valid agreement to arbitrate and a sufficient nexus with interstate commerce exists to implicate the substantive provisions of the Federal Arbitration Act,' (Court Order, at 2.)," I do not agree with the Motion for Reconsideration's assumption, *see, e.g.,* at the motion's p. 7, that review of the issues raised by the motion should be governed by Washington authorities such as *Broom v. Morgan Stanley DW Inc.,* 169 Wn. 2d 231, 237 (2010)("facial errors of law" are grounds for vacatur). When an arbitration is conducted pursuant to the FAA, as is the case here, review as to whether the requirements of Section 10(a)(4) of the FAA, 9 U.S.C. §10(a)(4), have been satisfied must be conducted by applying authorities such as *Oxford Health Plans, LLC v. Sutter,* 569 U.S. 564, 133 S. Ct. 2064, 2069-71 (2013) and the many companion FAA authorities addressing that issue.

in the Interim Award. Although the motion makes many aggressive and rhetorical factual assertions as to whether the common law fraud counterclaim was proven, whether the subcontracts, change orders and Notes were induced by the misconduct found concerning the aiding and abetting counterclaim, whether Claimant allegedly earned excessive profits under the subcontracts, and whether the aiding and abetting misconduct caused Respondents any actual damages except those found in the Interim Award, the actual facts proven at the Arbitration Hearing, as discussed in detail above, were to the contrary. In addition, the motion fails to acknowledge the consequences for Respondents' case of the facts, which were proven at the Arbitration Hearing, that Respondents' top management chose, long after Mr. Hutchinson's departure, to execute numerous additional and subsequent change orders and to insist that Serpanok continue to perform under the subcontracts at the previously-agreed pricing. The motion similarly fails to establish any persuasive factual or other basis for concluding that RCW 9A.68.060, a criminal statute, requires a determination that the subcontracts, change orders or notes at issue here were "illegal contracts." (*See, supra,* at 27-28.) Most importantly, as discussed above and as found in the Interim Award:

> . . . the evidence did not establish that Mr. Hutchinson's breaches of fiduciary duty resulted in damages to Counterclaimants during performance of the two subcontracts. In particular, as discussed above, Respondents' claims that Mr. Hutchinson's misconduct improperly caused Respondents to overpay for change order work during the performance of the subcontracts were not established. Counterclaimants established that Serpanok aided and abetted breaches of fiduciary duty by Mr. Hutchinson, but did not establish that those breaches damaged Respondents either by wrongfully inducing the two subcontracts or by causing Respondents to overpay subsequently for change order work. As discussed above, Mr. Blake was a key witness on these points.

(Interim Award, at 26.) This conclusion, which was compelled by the evidence presented at the Arbitration Hearing, was fatal to Respondents' counterclaim and defenses based on alleged breach of the duty of good faith and fair dealing, because Respondents failed to prove that the aiding and abetting misconduct proximately caused them any damage under the subcontracts or Notes, or proximately caused them to receive less than the performance promised under those contracts in any material respect. Finally, proof - determined under a preponderance of the evidence standard - of aiding and abetting a breach of fiduciary duty by an employee does not suffice to prove either common law fraud - all elements of which must be proven by clear, cogent and convincing evidence, which was not done here, for the reasons discussed above - or automatically, without proof of causation or damages, render all contracts in which the employee had any role in the counterparty's performance "illegal contracts." The Motion for Reconsideration must be denied because it depends on factual assertions not proven at the Arbitration Hearing.

Second, the Interim Award's determinations granting Claimant relief on its subcontract-based and Notes-based claims certainly considered, and rejected, all of Respondents' affirmative defenses, including the "illegal contracts" or "public policy" affirmative defenses. (*See,* Interim Award, 14-20, 29-30.) The discussion set forth in the Interim Award constituted my best effort to follow the parties' agreement that the award should be in a "format that briefly explains the principal reasons for the relief awarded," (Procedural Order No. 1, ¶ 14), and discussed the case as presented by the parties at the Arbitration Hearing and in the post-hearing briefing, where Respondents' placed principal emphasis on their common law fraud counterclaim rather than the affirmative defenses now emphasized in the Motion for Reconsideration. As the Interim Award concluded, those defenses lack merit and were not established. Such defenses are inapplicable in a case, as here, where Respondents failed to prove that the misconduct found relating to Respondents' aiding and abetting counterclaim fraudulently induced or otherwise caused the parties to enter into the two construction subcontracts, change orders or Notes, and similarly failed to prove that the misconduct proximately caused actionable contract overpayments, improper work, or the like, following execution of the contracts. The damages caused by the misconduct proven on the aiding and abetting counterclaim must be limited to the damages actually proven to have been caused by that misconduct, all of which were confined to Mr. Hutchinson's employment relationship with his employer.

The motion's reliance on *State v. Pelkey,* 58 Wn. App. 610, 615 (1990), and similar cases cited, was inapposite and unpersuasive. The *Pelkey* decision declined to order the return of property apparently given to a police officer as a bribe; the decision addressed the enforceability of "the agreement between Pelkey and Sgt. Brauch. . .." *Pelkey,* 58 Wn. App. 610, at 615. Unlike the *Pelkey* decision, Respondents' Motion for Reconsideration does not focus on the apparent agreement between Claimant and Mr. Hutchinson but rather seeks to automatically invalidate other, collateral agreements – the two construction subcontracts and the Notes – that ran between Claimant and various of the Respondents, to which Mr. Hutchinson was not a party. The *Pelkey* decision does not compel the conclusion sought in the motion, on the very different fact situation found here, that construction subcontracts and Notes entered into between LLC affiliates of an owner and a contractor, must automatically be classified as illegal and unenforceable contracts because Claimant was found, by a preponderance of the evidence, to have aided and abetted breaches of fiduciary duty by one of the agents of Claimant's counterparties. This is particularly true where, as found here, the only damage found to have been caused by the aiding and abetting misconduct related to Hutchinson's performance of his agency/employment relationship to his employer and the employer's affiliates (for which an appropriate damages award has been made), and Respondents were unable to prove that the aiding and abetting misconduct proximately caused them any damage at all under the subcontracts and Notes. The fact situation in *Pelkey* also has no parallel in numerous other respects to the facts found here, where the collateral contracts that the motion seeks to invalidate were entered into by organizational parties with numerous top management officials in addition to Mr. Hutchinson, where Hutchinson's role in performance of the challenged collateral contracts was confined to only a portion of the relevant time period, where other top executives of Respondents reviewed the situation after

Mr. Hutchinson left and approved change orders that had the effect of requiring Claimant to complete performance as agreed under the subcontracts and change orders, and where Respondents received the benefits of millions of dollars of valuable work done by Claimant at their insistence. The Motion for Reconsideration must be denied because the motion failed to establish an adequate causal link between the misconduct found on the aiding and abetting counterclaim and the relief sought in the motion.

Third, the Motion for Reconsideration cannot be granted because the relief sought by the motion is unjust and inequitable. The motion persistently failed to acknowledge that the evidence presented at the Arbitration Hearing did not establish that Respondents overpaid for the two subcontracts, or the change orders, or the Notes, or that the work done pursuant to those contracts was substandard, defective or improperly delayed. All of Respondents' claims to this effect were rejected in the Interim Award because they were not proven. What the evidence did establish was that Serpanok did the work for competitive prices (or better), did the work competently and completed the work in a reasonable and timely manner pursuant to the contracts, except in the one instance, discussed above, where completion of the last bit of the Garage project was prevented by improper conduct of Respondents. It is neither just nor equitable for Respondents to seek to escape their contractual obligation to pay for this work, the benefits of which they have received and enjoyed, based on the arguments raised in the Motion for Reconsideration. This is particularly true in view of the evidence that, long after Hutchinson had departed, Respondents aggressively and repeatedly demanded that Serpanok continue working on the Project to get it to completion, including by approving subsequent change orders reviewed and approved by different management officials, and that Serpanok did so. The Interim Award's finding that Claimant engaged in the misconduct found on the aiding and abetting counterclaim should not become a pretext allowing Respondents to escape their duty to pay for millions of dollars worth of valuable work done on their buildings in accordance with the parties' contracts.

Fourth, as discussed in the Interim Award, at 20, a party making a claim of breach of the implied duty of good faith and fair dealing must establish, among other things "damages proximately caused by the breach." *Cachiotti Properties, LLC v. Phillips,* 200 Wn. App. 1001 (2017); Respondents, however, failed to establish that Serpanok's alleged breach of the duty of good faith and fair dealing resulted in "damages proximately caused by the breach." As found in the Interim Award and discussed above, Respondents' evidence failed to establish that the misconduct found relating to the aiding and abetting counterclaim caused Respondents to suffer any damages during performance of the two subcontracts, change orders or Notes. Instead, the evidence established that Respondents received the full performance for which they had contracted under those contracts. The evidence established that the work covered by Serpanok's claims based on the subcontracts either fell within the scope of work covered by the respective subcontracts as originally agreed or constituted extra work authorized under subsequently-signed change orders, was satisfactorily performed and was accurately invoiced at the prices agreed upon by the parties. In addition, as also discussed above, the counterclaims for back charges and delays/liquidated damages also were not established. The only damages proven to have been caused by the misconduct under the aiding and abetting

counterclaim related to an entirely different contract - Mr. Hutchinson's employment contract with his employer - and accordingly cannot serve as basis for a finding of damages on a breach of good faith and fair dealing theory asserted with regard to other contracts - the subcontracts, change orders and Notes - where no actual damage proximately caused by the misconduct in question was proven. Instead, the Interim Award appropriately made the only actual damages proven by that misconduct the subject of a damages award in an amount commensurate with the quantum of damages proven to have been caused by that conduct.

Fifth, as discussed above, the parties to this arbitration expressly agreed to application of arbitral rules providing that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. . .." Exercising that discretion here, I find that the relief sought by the Motion for Reconsideration (*see* Respondents' submission dated September 11, 2019, detailing the specific relief sought if the motion were granted, which would deny Claimant recovery for millions of dollars due and owing under the parties' contracts in return for valuable work done and accepted, and also deny them Notes payments promised in lieu of timely payments under the subcontracts but never made) would not be "just and equitable," that the subcontracts, change orders and Notes discussed above are not "illegal contracts," and the parties' subcontracts, change orders and Notes authorize the relief awarded herein.

Sixth, and finally, neither the Interim Award nor this Final Award "condones fraud." As discussed above at length, Respondents failed to prove their claims of fraud in this case. I do not approve of the misconduct found against Claimant on the aiding and abetting claim, and have awarded what I believe to be appropriate relief on account of that misconduct. It is not "condoning fraud" to decide that tort damages for aiding and abetting a breach of fiduciary duty should be limited in quantum to the damages that were proximately caused by that conduct and actually proven by the evidence presented. Similarly, it does not "condone fraud" to apply Washington's requirement that each of the nine elements required to establish a claim of fraud must be proven by clear, cogent and convincing evidence.

I. Sanction for Spoliation and Discovery Abuse.

As discussed above, I have determined that the appropriate sanction for Mr. Kunitsa's act of spoliation and discovery abuse is a monetary sanction that fully compensates Respondents for all attorneys' fees and other expenses reasonably incurred on account of the misconduct. Applying that standard, and based on my review of the parties' submissions concerning quantification of an appropriate sanction, (*see* Respondents' submission dated July 24, 2019, at 16-19; Claimant's opposition dated August 7, 2019, at 17-19; and Respondents' reply papers submitted August 14, 2019, at 5-9), I find that $500,000 is an appropriate monetary sanction against Claimant.

My principal reasons for awarding this amount are as follows: First, Respondents' submissions, and in particular the certifications of their counsel, persuaded me that a substantial amount of legal work could have been avoided if the spoliation and discovery abuse

had not been committed by Claimant. Second, I agreed with Respondents that an approach based on a reasonable estimate was the most appropriate method for quantifying the sanction, and found their estimate generally reasonable. Third, I made some deduction for uncertainties in that estimate, but ultimately awarded the bulk of the amount estimated in recognition of the difficulties inherent in making a more precise attribution in a complex case such as the present one. Finally, I felt it important for such uncertainties to be resolved in a manner that resulted in setting the sanction at an amount large enough to serve as a deterrent against similar conduct in the future.

For these reasons, Respondents are hereby awarded $500,000 as an appropriate monetary sanction against Claimant on account of Claimant's acts of spoliation and discovery abuse committed during this case.

J. **Pre-Award Interest and Additional Bond Costs.**

Section R-47(d) of the Rules provides that "[t]he award of the arbitrator(s) may include: i. interest at such rate and from such date as the arbitrator(s) may deem appropriate. . .."

The Interim Award, at 29, awarded Claimant "principal amounts totaling $852,740 on its claims against Respondents POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC under the Building 1A subcontract, and $2,236,847 on its claims against Respondent POINT RUSTON PHASE II, LLC under the Garage (Building 9/11) subcontract, plus additional interest on these amounts in amounts to be set during the Final Award phase of this case. . .." As permitted under the Interim Award, Claimant applied for an award of pre-award interest on these amounts, and the parties made timely submissions in support of and in opposition to that application. I find that the amounts awarded above are liquidated sums, that Claimant is entitled to recover prejudgment interest on those amounts, overrule Respondents' objections to an award of such interest, and find that Claimant's submissions concerning the calculation of the amount of pre-award interest to be awarded are persuasive.[11] Accordingly, Claimant is awarded $349,076.64 for pre-award interest on its claims against Respondents POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC under the Building 1A subcontract, plus an additional amount of $280.35 per day for each day from August 15, 2019, until the date of issuance of this award. In addition, Claimant is awarded $1,142,391.38 for pre-award interest on its claims against Respondent POINT RUSTON PHASE II, LLC under the Garage (Building 9/11) subcontract, plus an additional amount of $735.40 per day for each day from August 15, 2019, until the date of issuance of this award.

[11] Details of the computations supporting the interest awards made on the subcontract-based claims, the Notes-based claims and the Garage lien claim are complex, and are set forth in detail in Claimant's application for an award of interest and reply papers submitted in support of that application, including the supporting sworn declarations submitted. In lieu of a lengthy recitation of the details of each such calculation here, suffice it to say I found the calculations presented by Claimant to be sound, including the rates and start dates used for the various calculations, and overrule Respondents' criticisms of those calculations.

The Interim Award, at 29, awarded Claimant "$701,263 in principal amount against Respondent POINT RUSTON, LLC on its claim under Note 2 and an additional $848,000 in principal amount on its claim against Respondent POINT RUSTON, LLC under Note 3, plus additional interest on these amounts in amounts to be set during the Final Award phase of this case. . .." As permitted under the Interim Award, Claimant applied for an award of pre-award interest on these amounts, and the parties made timely submissions in support of and in opposition to that application. I find that the amounts awarded above are liquidated sums, that Claimant is entitled to recover prejudgment interest on those amounts, overrule Respondents' objections to an award of such interest, and find that Claimant's submissions concerning the calculation of the amount of pre-award interest to be awarded are persuasive. Accordingly, Claimant is awarded $181,752.41 for pre-award interest on its claim against Respondent POINT RUSTON, LLC under Note 2, plus an additional amount of $192.13 per day for each day from August 15, 2019, until the date of issuance of this award. In addition, Claimant is awarded $419,910.98 for pre-award interest against Respondent POINT RUSTON, LLC under Note 3, plus an additional amount of $325.26 per day for each day from August 15, 2019, until the date of issuance of this award.

The Interim Award, at 29, awarded Claimant "the principal amount of $2,236,847 against Respondent POINT RUSTON PHASE II, LLC on its claim to foreclose and recover on its mechanic's lien filed on Building 9/11 (the Garage), plus additional interest on this amount in an amount to be set during the Final Award phase of this case. . .." As permitted under the Interim Award, Claimant applied for an award of pre-award interest on this amount, and the parties made timely submissions in support of and in opposition to that application. I find that the amount awarded above is a liquidated sum, that Claimant is entitled to recover prejudgment interest on that amount, overrule Respondents' objections to an award of such interest, and find that Claimant's submissions concerning the calculation of the amount of pre-award interest to be awarded are persuasive. Accordingly, Claimant is awarded $894,266.10 for pre-award interest on its claim against Respondent POINT RUSTON PHASE II, LLC on its claim to foreclose and recover on its mechanic's lien filed on Building 9/11 (the Garage), plus an additional amount of $735.40 per day for each day from August 15, 2019, until the date of issuance of this award.

The Interim Award, at 29, awarded Respondents "$394,116 against Claimant SERPANOK CONSTRUCTION, INC. on its counterclaim for improper filing of the Building 1A lien, plus any additional interest, if any, on this amount in an amount to be set during the Final Award phase of this case." Respondents applied for an award of additional bond costs in addition to this amount, and the parties made timely submissions in support of and in opposition to that application. I find that the Respondents are entitled to recover the additional bond costs requested, overrule Claimant's objections to an award of such amount, and find that Respondents' submissions concerning the calculation of the amount of additional bond costs to be awarded are persuasive. Accordingly, Respondents are awarded $58,952.62 for additional bond costs incurred since issuance of the Interim Award, plus an additional $450.02 per day for each day from August 15, 2019, until the date of issuance of this award. In addition,

Respondents are also awarded the following declaratory and injunctive relief: Upon request from Respondents, Claimant shall provide all reasonable cooperation to assist Respondents in securing release of the invalid lien on Building 1A, including obtaining return of the collateral posted for the bond related to that lien.

The Interim Award, at 30, awarded "Counterclaimants POINT RUSTON PHASE II, LLC, CENTURY CONDOMINIUMS, LLC and POINT RUSTON, LLC, collectively, $311,894 against Claimant SERPANOK CONSTRUCTION, INC. on their counterclaims for aiding and abetting breaches of fiduciary duty by those Counterclaimants' agent." Although the Interim Award did not authorize Respondents to apply for an award of pre-award interest on this amount, they did so, requesting an award of $212,668.98 for such pre-award interest, plus an additional $102.54 per day for each day from August 15, 2019, until the date of issuance of this award. Respondents' application conceded that *Coulten v. Asten Group, Inc.,* 155 Wn. App. 1, 13 (2010) counsels that under Washington law a party is generally not entitled to an award of prejudgment interest on an unliquidated tort claim recovery, but Respondents argued that the Rules, Section R-47(a) and (d) authorize me to make a discretionary award of such pre-award interest on the facts of this particular case, and also argued that cases such as *Miller v. Robertson,* 266 U.S. 243, 257-58 (1924) and *Colonial Imports v. Carlton NW, Inc.,* 83 Wn. App. 229, 243 (1996), also authorize such a discretionary award of pre-judgment interest on unliquidated claims in particular cases, where equity so requires. Both of these arguments conceded that any authority I might have to make such an award is discretionary. Assuming without deciding that I do have such discretion, I exercise any such discretion to deny Respondents' application for an award of pre-award interest on the unliquidated amount awarded to them on their aiding and abetting counterclaim. On the facts of this particular case, the equitable arguments advanced by Respondents in favor of exercising any such discretion in favor of making an award of pre-judgment interest on Respondents' unliquidated tort recovery were not established and were insufficient to warrant departure from the general approach taken in Washington pursuant to authorities such as *Coulten*. Accordingly, Respondents' application for an award of pre-award interest on the $311,894 awarded to them on their aiding and abetting counterclaim is denied.

K. <u>Claims for Fees and Costs</u>.

Section R-47 of the Rules provides:

> (d) The award of the arbitrator(s) may include: . . . ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

Both of the subcontracts' identical arbitration clauses provide as follows:

> In the event of a dispute concerning this Agreement, its meaning or enforcement, such dispute shall be submitted to a single arbitrator, under the commercial arbitration rules of the

> American Arbitration Association, with the arbitration to be held in Tacoma, Washington. The arbitrator shall determine that one party has substantially prevailed and shall award to that party in addition to any other relief granted, that parties [*sic*] actual attorney's fees and costs of arbitration including travel, accommodations and witness fees.

(Exs. 10/1072, ¶16.1 (Building 1A Subcontract); Ex. 119/1204, ¶16.1 (Building 9/11 [Garage] Subcontract)).

Both of the relevant Notes contain the following provision:

> Borrower [Point Ruston LLC] agrees to reimburse Lender [Serpanok Construction, Inc.] on demand for any legal fees and other costs and expenses reasonably incurred in collecting or enforcing this Note and protecting or realizing on any collateral.

(Ex. 201, Section 7 (Note 2); Ex. 202, Section 4 (Note 3)).

RCW 60.84.181(1)(e) and 3 authorizes fee-shifting in favor of "the prevailing party" for "the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorney's fees and necessary expenses incurred by the attorney . . . as the court or arbitrator deems reasonable."

Both Claimant and Respondents requested an award of attorneys' fees and costs in this arbitration. Claimant requested a total award of $1,377,951.25 for such fees and expenses (including AAA charges). (Cl. submission dated July 24, 2019). Respondents requested a total award of $2,707,592.10 for such fees and expenses (including AAA charges and excluding the requested discovery sanction). (Respondents' submission dated July 24, 2019) Each side opposed the other's application in subsequent submissions.

Based on these provisions and submissions, I conclude that both prongs of Section R-47(d)(ii) ("all parties have requested such an award" and "it is authorized by law or their arbitration agreement") authorize me to make an award of fees and expenses to Claimant in this case, and that such an award to Claimant is required on the subcontract-based ("The arbitrator shall determine that one party has substantially prevailed and shall award. . .) and also on the Notes-based ("Borrower agrees to reimburse Lender. . .") claims. Under both the Rules (*see* Section R-47(a)(" The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. . .")) and Washington law generally, *see Am. Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn. 2d 217, 234 (1990), the amount of any such award is discretionary, and must be reasonable.

Exercising my authority to make such an award under the above-referenced provisions, and based on my review of the parties' opposing applications, I award as follows on the claims for fees and costs:

First, Claimant's application for an award of its fees and costs against Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC is granted, as follows: Claimant is awarded $1,249,990.25 for its attorneys' fees and $52, 961.04 (exclusive of AAA charges, which are addressed separately below) for its expenses reasonably incurred on the claims and counterclaims related to the two subcontracts and the Notes against Respondents POINT RUSTON, LLC and POINT RUSTON PHASE II, LLC. Claimant is also awarded $593,919.61 for its attorneys' fees and expenses reasonably incurred on the claims and counterclaims related to the Building 1A subcontract against Respondent CENTURY CONDOMINIUMS, LLC as co-obligor on that contract. The total amount recovered by Claimant on these awards, however, may not exceed $1,302,951.29.

Second, no fees or costs are awarded to Claimant against Respondent MICHAEL COHEN. Claimant did not prevail on any claims against Mr. Cohen. Rather, Respondent Cohen prevailed on Claimant's claim of tortious conversion, the only claim asserted against him. In addition, Mr. Cohen is not subject to the Section 16.1 "one party" fee-shifting procedure because he is not a party to the subcontracts, and also is not a party to the Notes. Respondent Cohen's application for an award of fees and costs in his favor is also denied. Mr. Cohen's application cannot be based on the contractual provisions referenced above because he is not a party to the subcontracts or Notes. The other, "equitable," bases for such an award urged by Respondents were not established, and in any event were necessarily addressed to my discretion. The amount of fees sought by Respondent Cohen on this claim, $733,201.17, was seriously unreasonable in amount, *see Mahler v. Szucs,* 135 Wn. 2d 398, 434-35 (1998), and disproportionate to the relationship of the litigation efforts devoted to the conversion claim as compared to the much more substantial work done on the other issues litigated in this case. Based on the record presented, I exercise my discretion under Section R-47(d) to deny Respondent Cohen's claim for an award of fees and costs.

Third, the applications of Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC for an award of attorneys' fees and costs are denied.

The principal reasons for these determinations are as follows:

First, as discussed above, Section 16.1 of the parties' subcontracts requires me to "determine that one party has substantially prevailed" on the issues "concerning" the subcontracts and then "award to that party in addition to any other relief granted, that parties [*sic*] actual attorney's fees and costs of arbitration including travel, accommodations and witness fees." Based on the discussion above, I hereby determine that Claimant was the "one party" that substantially prevailed on the subcontracts-related claims, defenses and counterclaims for purposes of applying Section 16.1. As Respondents note, Claimant did not prevail on all issues. On balance, however, Claimant did prevail on the central issues presented

at the Arbitration Hearing that concerned the subcontracts, including the subcontract-based claims, the common law fraud counterclaim, Respondents' various "illegality" and other defenses argued in opposition to those claims, and on all of the backcharge and delay issues. I further find that the above-referenced provisions in the Notes and RCW 60.84.181(1)(e) and 3 entitle Claimant to recovery of that part of its fee application based on the Notes and the successful lien claim.

Second, since I do not find that Respondents, collectively or individually, qualify as "the one" that "substantially prevailed" on the claims, defenses and counterclaims concerning the subcontracts, Section 16.1 requires the fee award to go to Claimant, not Respondents, on all of the claims "concerning" the subcontracts, even though Respondents did prevail on a few subcontract-related issues. As to the application of Respondent Cohen, who was not a party to the subcontracts, even if Mr. Cohen's application could be allowed to proceed pursuant to Section 16.1 on a third-party beneficiary or similar basis, his application would still fail because it would then become subject to the "one party" determination procedure required under Section 16.1. Even though he prevailed on the conversion claim, Mr. Cohen could not fairly be designated as the "one party" that "substantially prevailed" on all of the subcontracts-related claims. For the reasons already discussed in detail above, Respondents' arguments that Section 16.1 and the fee-shifting provisions in the Notes are unenforceable because contained in fraudulently-procured or otherwise "illegal" or unenforceable contracts were not established. Finally, I found the "equitable" and other grounds urged by Respondents' in support of their application for an award of fees and costs to be both unpersuasive and inadequately tethered to the parties' contractual agreements, discussed above, concerning how fee-shifting claims should be resolved at the conclusion of litigation subject to those provisions.

Third, in general and subject to the discussion that follows, I found Claimant's application to be carefully and conscientiously prepared, well-documented and reasonable in amounts sought. This was a high-stakes case for both sides that involved numerous and complex issues, many witnesses, voluminous document discovery and exhibits, substantial motion practice, three weeks of Arbitration Hearings and, as discussed above, expert testimony that turned out to be critically important to the case's outcome. I find that the time and labor invested by Claimant's counsel was appropriate for the complexity and importance of the issues presented, the rates charged were reasonable when compared to those customarily charged for similar work in the community, the results obtained constituted a substantial, although not complete, victory on the most important claims and counterclaims at issue, and that Claimant's counsel are experienced lawyers with fine reputations in the community who staffed this case appropriately and efficiently. I also note that the amount of Respondents' opposing fee application very substantially exceeded - approximately doubled - the amounts sought by Claimant to litigate the same case; although not in and of itself dispositive, I found this comparison useful in assessing the reasonableness of Claimant's application. Respondents' counsel are also outstanding attorneys, highly experienced in this field of work. In general, the fact that they deemed it appropriate to devote the very extensive efforts to this case documented in their fee application corroborated the reasonableness of Claimant's application.

Fourth, I did find it appropriate to make two adjustments to the fee amounts sought in the Claimant's application. First, based on my review of the application, I concluded that an additional deduction was needed to allow for the work done by Claimant on the tort-based aiding and abetting counterclaim. None of the subcontract-based, Notes-based and lien-based fee-shifting provisions discussed above permit Claimant to recover fees for that work. Although Claimant appropriately excluded over $100,000 from its application for such work (Cl. Reply, dated August 14, 2019, at 13), my review of the briefing on the time records persuaded me that an additional deduction of $35,000 from the fee award is appropriate. Second, based on the briefing submitted, Respondents persuaded me that some additional deduction is appropriate to remove work done on legal proceedings outside the arbitration. Although Claimant did make some adjustment for this factor in its application, based on the parties' submissions I concluded that an additional deduction of $40,000 is appropriate for this reason. In total, Claimant sought a total of $1,324,990.25 in fees. For the reasons discussed above, I have deducted a total of $75,000 from this amount, for a total fee award of $1,249,990.20.

Fifth, I found Respondents' various other criticisms of the Claimant's application unpersuasive, and they are overruled.

L. Allocation of the Fees and Expenses of the Arbitration.

The Rules, Section R-47(c), provide that "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." Exercising the discretion granted under these Sections of the Rules, I have determined that Claimant should be awarded such fees, expenses and compensation against all Respondents except Respondent MICHAEL COHEN.

The principal reasons for this decision are largely the same as those discussed above concerning the award of attorneys' fees and other litigation expenses. As between the parties to the subcontracts and Notes, Section 16.1 and the other fee- and expense-shifting provisions discussed above warrant a similar award of Claimant's expenses of the arbitration against Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC. This award of arbitration expenses does not run against Respondent MICHAEL COHEN, however, because he prevailed on the only claim asserted against him. I did not make an award of arbitration expenses to Mr. Cohen because AAA financial records indicate that he did not pay any of the amounts paid by Respondents towards the expenses of the arbitration.

M. Net Relief Awarded.

Claimant has obtained an award in its favor on the claims addressed in Parts III.B and III.C and on one of the claims discussed in Part III.D above. Based on the interrelated subject matters of those claims - the Notes-based and lien-based claims ultimately interrelate with the amounts sought in the subcontract-based claims - and on the manner in which these claims

were presented by Claimant in this arbitration, a limiting direction is required setting a ceiling on the total recovery permissible on those awards. Accordingly, Part IV below provides that the total recoveries on those claims, collectively, may not exceed the total amount awarded on the subcontract- based claims. *See* Part IV.D below.

Awards have been made in this Final Award in favor of Claimant on three sets of claims (the subcontracts-based claims, the Notes-based claims and the lien-based claim on the Garage), and in favor of Counterclaimants on two of the counterclaims (the counterclaims for invalid filing of the lien on Building 1A and the aiding and abetting counterclaim). In addition, Respondents have been awarded an appropriate sanction, as discussed above. Distinctions between the individual parties' separate payment responsibilities aside for the moment, and including the interest and bond costs awarded, and excluding the awards of fees and expenses, Claimant is awarded a total recovery of $4,646,062, and Respondents are awarded a total recovery of $1,293,764.

IV. FINAL RELIEF AWARDED.

A. Claimant SERPANOK CONSTRUCTION, INC. is awarded principal amounts totaling $852,740 on its claims against Respondents POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC under the Building 1A subcontract, and $2,236,847 on its claims against Respondent POINT RUSTON PHASE II, LLC under the Garage (Building 9/11) subcontract, plus pre-award interest on these amounts as awarded below. Respondents' defenses and counterclaims based on those subcontracts are denied and are hereby dismissed with prejudice. Claimant is also awarded $367,019 for pre-award interest on its claims against Respondents POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC under the Building 1A subcontract. In addition, Claimant is awarded $1,189,456 for pre-award interest on its claims against Respondent POINT RUSTON PHASE II, LLC under the Garage (Building 9/11) subcontract. Including the interest so awarded, Claimant SERPANOK CONSTRUCTION, INC. is awarded the total amount of $1,219,759 on its claims against Respondents POINT RUSTON PHASE II, LLC and CENTURY CONDOMINIUMS, LLC under the Building 1A subcontract, and $3,426,303 on its claims against Respondent POINT RUSTON PHASE II, LLC under the Garage (Building 9/11) subcontract. The total amount so awarded to Claimant SERPANOK CONSTRUCTION, INC. on its claims under the two subcontracts is $4,646,062.

B. Claimant SERPANOK CONSTRUCTION, INC. is awarded $701,263 in principal amount against Respondent POINT RUSTON, LLC on its claim under Note 2 and an additional $848,000 in principal amount on its claim against Respondent POINT RUSTON, LLC under Note 3, plus pre-award interest on these amounts as awarded below. Respondents' defenses and counterclaims based on those Notes are denied and are hereby dismissed with prejudice. Claimant is also awarded $194,048 for pre-award interest on its claim against Respondent POINT RUSTON, LLC under Note 2. In addition, Claimant is awarded $440,728 for pre-award interest against Respondent POINT RUSTON, LLC under Note 3. Including the interest so awarded, Claimant SERPANOK CONSTRUCTION, INC. is awarded the total amount of $895,311 on its claims against Respondent POINT RUSTON, LLC under Note 2 and $1,288,728 on its claims

under Note 3. The total amount so awarded to Claimant SERPANOK CONSTRUCTION, INC. on its claims under the two Notes is $2,184,039.

C. Claimant SERPANOK CONSTRUCTION, INC. is awarded the principal amount of $2,236,847 against Respondent POINT RUSTON PHASE II, LLC on its claim to foreclose and recover on its mechanic's lien filed on Building 9/11 (the Garage), plus pre-award interest on this amount as awarded below. Respondents' defenses and counterclaims based on the Building 9/11 (Garage) lien are denied and are hereby dismissed with prejudice. Claimant is also awarded $941,332 for pre-award interest on its claim against Respondent POINT RUSTON PHASE II, LLC on its claim to foreclose and recover on its mechanic's lien filed on Building 9/11 (the Garage). Including the interest so awarded, Claimant SERPANOK CONSTRUCTION, INC. is awarded the total amount of $3,178,179 on its claim against Respondent POINT RUSTON PHASE II, LLC on its claim to foreclose and recover on its mechanic's lien filed on Building 9/11 (the Garage).

D. Claimant SERPANOK CONSTRUCTION, INC.'s total recovery under the awards made in Parts IV.A, Parts IV.B and IV.C above may not exceed $4,646,062.

E. Claimant's SERPANOK CONSTRUCTION, INC.'s claim to foreclose and recover on its mechanic's lien filed on Building 1A is denied and is hereby dismissed with prejudice.

F. Counterclaimant CENTURY CONDOMINIUMS, LLC is awarded $394,116 against Claimant SERPANOK CONSTRUCTION, INC. on its counterclaim for improper filing of the Building 1A lien, plus additional bond costs as awarded below. Respondents are also awarded $87,754 for additional bond costs incurred since issuance of the Interim Award related to the invalid lien on Building 1A. Including the additional bond costs so awarded, Counterclaimant CENTURY CONDOMINIUMS, LLC is awarded the total amount of $481,870 against Claimant SERPANOK CONSTRUCTION, INC. on its counterclaim for improper filing of the Building 1A lien In addition, Respondents are also awarded to the following declaratory and injunctive relief: Upon request from Respondents, Claimant shall provide all reasonable cooperation to assist Respondents in securing release of the invalid lien on Building 1A, including obtaining return of the collateral posted for the bond related to that lien.

G. Counterclaimants POINT RUSTON PHASE II, LLC, CENTURY CONDOMINIUMS, LLC and POINT RUSTON, LLC, collectively, are awarded $311,894 against Claimant SERPANOK CONSTRUCTION, INC. on their counterclaims for aiding and abetting breaches of fiduciary duty by those Counterclaimants' agent. Respondents' application for an award of pre-award interest on this amount is denied.

H. If this award is confirmed and converted to a judgment, post-award interest shall accrue as provided by law.

I. Respondents are hereby awarded $500,000 as an appropriate monetary sanction against Claimant on account of Claimant's acts of spoliation and discovery abuse committed during this case.

J. Claimant SERPANOK CONSTRUCTION, INC.'s conversion claim against Respondents POINT RUSTON PHASE II, LLC and MICHAEL COHEN is denied and dismissed with prejudice.

K. Claimant SERPANOK CONSTRUCTION, INC. is awarded $1,249,990.25 for its attorneys' fees and $52,961.04 (exclusive of AAA charges, which are addressed separately below) for its expenses reasonably incurred on the claims and counterclaims related to the two subcontracts and the Notes against Respondents POINT RUSTON, LLC and POINT RUSTON PHASE II, LLC. Claimant is also awarded $593,919.61 for its attorneys' fees and expenses reasonably incurred on the claims and counterclaims related to the Building 1A subcontract against Respondent CENTURY CONDOMINIUMS, LLC as co-obligor on that contract. The total amount recovered by Claimant on the awards made in this paragraph may not exceed $1,302,951.29. Respondents' application for an award of fees and litigation expenses in their favor is denied.

L. The Administrative fees and expenses of the AAA, totaling $29,400.00, are to be borne, in the amount of $29,400.00, by Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and Respondent CENTURY CONDOMINIUMS, LLC. The compensation and expenses of the Arbitrator, totaling $331,200.00, are to be borne, in the amount of $331,200.00, by Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and Respondent CENTURY CONDOMINIUMS, LLC. Accordingly, Respondents POINT RUSTON, LLC, POINT RUSTON PHASE II, LLC and Respondent CENTURY CONDOMINIUMS, LLC shall pay to Claimant SERPANOK CONSTRUCTION, INC. the amount of $180,300.00 to reimburse Claimant for such amounts previously advanced by Claimant. No award of arbitration expenses is made to or against Respondent MICHAEL COHEN.

V. MISCELLANEOUS PROVISIONS.

This Final Award is in full and final satisfaction and settlement of all claims, defenses and requests for relief submitted in this arbitration. All other claims and counterclaims not specifically addressed and granted herein are denied.

DATED this 18th day of October, 2019.

Thomas J. Brewer
Arbitrator

SMITH GOODFRIEND, PS

January 28, 2022 - 3:04 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,422-2
Appellate Court Case Title:	Serpanok Construction, Inc. v. Point Ruston, LLC, et al.
Superior Court Case Number:	16-2-13153-6

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